THE EFFECTS OF AN ADOPTION IN HINDU AND ENGLISH LAW: A COMPARATIVE STUDY

By

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ABSTRACT

The subject of the thesis has been dealt with under ten chapters. In each of the chapters the Hindu law has been discussed in its various aspects, including the Smriti law on the subject, the views of the commentators, the judicial decisions and the position under the Anglo-Hindu law, the present law under the Hindu Adoption and Maintenance Act 1956, and compared with the corresponding English and other laws on the subject. I have considered or referred to about seven hundred judicial decisions and also given my own views and suggestions wherever appropriate.

The first chapter deals, among other topics, with the object of adoption, and the sources and history of the Hindu and English Adoption laws. The next few chapters deal with the comparative effects of adoption in the two legal systems in the child's natural and adoptive families and the adoptee's right to succeed to relations in the maternal and paternal families of the adoptive father. Chapter Vi deals exhaustively with the important question of the doctrine of 'relation back' from its inception to the latest Supreme Court decisions and the views of different writers on the subject and my own. Other topics include ante-adoption agreements and the effect of adoption in forms, other than the dattaka.

I have shown the close similarity between the present day Hindu and English laws of adoption especially in so far as the effects of the institution are concerned as compared to many other countries where the laws are not

as strictly logical.

I have also discussed why the adoption of daughters should have been recognised even under the Pre-HAMA period.

In the concluding chapter I have discussed various current problems especially the necessity of having an adoption law in India for communities other than Hindus also, who at present have no legally recognised adoption law. I have suggested that there should be, for a period, a two-fold legal institution of adoption, one based upon the Sastra (the Dattaka form) and available to Hindus and another of a purely secular kind available to all persons subject to Indian law in this regard, including the Hindus. This appears to me to be the most feasible course to be adopted under the present circumstances in India.

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I am also indebted, in general, to a galaxy of scholars of many nationalities and of different ages from whom I have been constantly gaining knowledge for the last several years.

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INTRODUCTION

What is Adoption?

Adoption is unique among the institutions of family law. In his work entitled, L'Adoption dans les Legislations Modernes, M. Ancel opines that it is not an essential institution like marriage and that it is essentially a luxury and not a necessity.[1a] With this view, however, the Hindu lawyers may not fully agree, who enjoin adoption by a sonless man to prevent his exclusion from heaven.[1b]

Adoption may be distinguished from what it is not by reviewing all the incidents of all systems of adoption and all institutionalised customs approximating to adoption. Professor Derrett divides the definition of adoption in two parts,[1c] a major and a minor, the major part telling what it is, and the second telling the reason why it is, in any particular jurisdiction, what it manifests itself to be, thus:

(i) Adoption is the Juridical device by which a relationship similar to that between parent and legitimate child is created between persons who otherwise would not stand in that relationship

(ii) The degree of similarity between the relationship created by adoption and the relationship of a legitimate child to its parents depends upon the

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1a. M. Ancel: L'Adoption dans les Legislations Modernes. Paris 1943. op.cit. p. 29.

1b. See pages 4 to 7.

1c. Adoption: A Preliminary Study, by J.D.M. Derrett (S.O.A.S., University of London), pages 4 ff. Estudio Preliminar Sobre la Adopcion: Institute de Derecho Comparado, Barcelona, 1956.

proportion in which the motives which jointly give rise to the device are experienced in the law-making body.

Adoption is a device, observes Derrett, because it is an organized pretence. It is juridical not merely because its application would be impossible and its organization futile unless the concept were a matter of law, but also because private acts will have no absolute validity without juridical recognition. Its pecularity is that it is similar to a natural one which is recognized everywhere, that between parent and legitimate child. Adoptions as grandparent, for example, are unknown.[1d] The adopting relationship is similar but not identical with the natural legitimate relationship. Its effects are not retrospective to birth; it cannot be revoked. in English law except by readoption, or if there is any interim adoption order. Adoption cannot be revoked under Hindu Law.

Though fostering and affiliations to the family of a restricted kind, such as testamentary gifts will perform severally the various objects of adoption, that is providing a secure background, maintenance and family affection to the child, only adoption will perform simultaneously more than one of them.

So also adoption is clearly distinguishable from wardship, and guardianship and custody orders under the Guardianship of Infants Acts, 1886-1971, now consolidated in The Guardianship of Minors Act, 1971, in that it is permanent and it extinguishes the parental rights and responsibilities of the natural parents.

1d. Adoption as sister in Assyrian Law is described by Driver & Miles: The Assyrian Laws, Oxford, 1935, p. 165, is really a sale of the right to give the girl in marriage and take her bride-price coupled with a duty to maintain and protect. It was an institution parallel to adoption but distinct from it as rightly observed by Derrett at footnote 16.

In a paper entitled 'Adoption of Children'; working paper containing the provisional proposals of the Departmental Committee on the Adoption of Children, 1970, adoption has been defined[1e] as the complete severance of the legal relationship between natural parents and child[1f] and the establishment of a new one between the child and his adoptive parents.

A similar definition of adoption is of the Dattaka or Dattrima son in the Hindu law, which is defined by Manu as follows:-

> "That (boy) equal (by caste) whom his mother or his father affectionately gives (confirming the gift) with (a libation of water), in times of distress (to a man) as his son, must be considered as an adopted son (Dattrima).[1g]

It is clear from this definition and also from Manu IX, 142;[1h] that in the case of the Dattrima adoption there is complete severance of the legal relationship between the natural parents and child and the establishment of a new one between the child and his adoptive parents, and incidently in this respect the definition propounded by the Departmental Committee on the Adoption of Children (London 1970) mentioned above conforms with this view.

Adoption survives as an institution because it serves perpetually recurring, if not universal needs. It is necessary therefore, to turn next to the motives which lead people to make adoptions.

1e. At Para 8.

1f. However in some countries the severance is not complete, especially in respect of matters of inheritance etc. See pages 161 ff.

1g. Manu IX, 168.

1h. See pages 56 ff for a discussion on Manu IX, 142.

The object of adoption under Hindu law.

The importance of having sons (adoption being one of the means of obtaining sons) under the Hindu law is clearly brought out by the following text of Yājñavalkya "Because continuity of the family in this world and the attainment of heaven in the next are through sons, son's sons and son's grandsons, therefore women should be loved and protected"[1i] Thus under the Hindu law the object of adoption is two-fold, one a temporal one for the continuity of the family in this world and the other a spiritual one for the attainment of heaven in the next. The Vedas and Smritis declare "Endless are the worlds of those who have sons; there is no place for the man who is destitute of male offspring". "May our enemies be destitute of offspring". "O Agni, may I obtain immortality by offspring".[2] And Manu says "since the son delivers his father from the hell named Put he was, therefore, called Puttra by Brahma himself";[3] and again, "By a son, a man obtains victory over all people; by a son's son, he enjoys immortality; and, afterwards, by the son of that grandson, he reaches the

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1i. Yajn., I, 78.

2. Rig Veda, I, 21, 5 cited in Vas., XVII, 2-4; Vishnu, XV, 45.

3. Manu IX, 138.

solar abode".[4] The above eulogies in praise of sonship almost unanimously found in no less authorities than the Vedas and the Smritis cannot be mere verbiage and the view of Lord Wynford attributing the spiritual efficacy of the possession of a son to a superstition of the people[5] does not seem to be correct.

According to the Vedas and Smritis an Aryan is born burdened with three debts viz., the debts to the Rishis, the Gods and the ancestors. "He owes the study of the Veda to the Rishis, sacrifices to the Gods, and a son to the manes". "He is free from debt who has offered sacrifices, who has begotten a son and who has lived as a student (with a teacher)".[6] So also Nārada says "Fathers desire male offspring for their own sake (reflecting) this son will redeem me from every debt whatsoever due to superior and inferior beings".[7] "The debts of ancestors fall on the sons who are enjoined to pay them, for otherwise the merit of their devotions and sacrifices will pass to the creditors".[8] So also Brihaspati says that the person who does not repay his debts is born as a servant or slave in his creditor's house. In the Vedas and Smritis, however, the emphasis was on the need for aurasa, or one's own legitimate sons and the irregular (secondary, or substitute) sons were not favoured. For the Veda says "O Āgni,

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4. Manu IX, 137.

5. Sutroogun Sutpatty v Sabitra Dye, (1835) 5 W.R. 109 (P.C.) Also see Cowell's Hindu Law Vol. I., page 210. Also referred to by S. Venkataraman: Adoption: Then and Now, (1957) 2 M.L.J. J, 65.

6. Taittriya - samhita VI, 3, 10, 5 cited in Vas., XI, 48; Manu, VI, 35-37, IX, 106, 107; XI, 66.

7. Colebrook's Dig. Vol. 1, p. 299.

8. Col. Dig. Vol. I, p. 299. It is a characteristic Hindu notion that merit (dharma) is transferable, like a valuable asset.

no son is he who springs from others".[9] "A son begotten of another, though worthy of regard is not even to be contemplated in the mind as fit for acceptance, for, verily he returns to his house. Therefore let there come to us a son new born, possessed of food and victorious over foes".[10] Manu in this connection says "Such advantage as a man would gain, who should attempt to pass deep water in a boat made of woven reeds, that father obtains, who passes the gloom of death, leaving only contemptible sons, (who are the eleven, or at least the six) last mentioned".[11] Baudhāyana says "After death the son belongs to the begetter; through carelessness a husband makes the procreation of a son useless".[12] Āpastamba cites Vedic authority to the effect that the son belongs to the begetter in the next world and condemns the Kshetraja and all kinds of subsidiary sons and extols the possession of the Aurasa or real legitimate son. Manu and other Smriti writers, however, sanction adoption of a son by a person in distress[13] for the sake of preventing the failure of obsequies and for the continuity of his name.[14] In another passage Manu says "Sages pronounce these eleven sons (beginning with the son of the wife and the rest) as specified to be substitutes of the

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9. Rig Veda cited in J.C. Ghose, I, 639.

10. Rig Veda, VII, 5, 8.

11. Manu IX, 161 (Sir W. Jones's translation edited by G.C. Haughton). The adopted son is however not among the last six sons mentioned by Manu.

12. Bandhayana II, 2, 3, 33-35; Sacred Books of the East XIV, p. 299.

13. Manu IX, 168, 141, 142; D.M.I., 7.

14. Dat. Mim. 1, 9. Manu also "A son of any description must be anxiously adopted by one who has none: for the sake of the funeral cake, water, and solemn rites; and for the celebrity of his name".

real legitimate son, for the sake of preventing the failure of obsequies".[15] So also Brihaspati says "As in default of ghee, oil is admitted by the virtuous as a substitute at sacrifices, so are the eleven sons admitted as substitutes in default of a legitimate son of the body and of an appointed daughter".[16] The Dattaka Mīmāmsā goes so far as to say "By the omission by a sonless man to adopt, an offence is incurred by him, resulting in his exclusion from heaven",[17] quoting Vasistha XVII, 2, "Heaven awaits not one destitute of a son...." and further a son has been shown to be the cause of redemption from debt. The Dattaka-Chandrikā says that although by the production of a son, according to Manu, exemption from debt takes place, still on the death of such a son, for the sake of funeral rites, the affiliation of another son is indispensable.[17a]

The object of adoption under the English law:-

Viscount Simon, while sponsoring the Adoption of Children Act, 1949, laid down the following basic principles which, he said must always be the governing consideration "What is best for the child in each individual case. That comes in front of everything else".[17b]

Social agencies concerned with child care treat adoption as one of the best alternatives for improving the lot of the deprived child which feeling is summed up in the Curtis Report of 1946[17c] on the care of children as follows:-

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15. Manu IX, 180; Dat. Mim. 1, 33.
16. Brihaspati XXV, 34.
17. Dat. Mim. 1, 5.
17a Dat. Chand. 1.5 for a brief review of the Hindu Law of Adoption. See Article by P. Bhattacharyya: Hindu Law of Adoption (1961) 2 S.C. J.J., 57.
17b Also referred to by Margaret Kormitzer's Child Adoption in the Modern World P. XII (1952 ed.).
17c. Care of Children, Committee Report 1946, Cmd 6922.

> "We wish to emphasise the extreme seriousness of taking a child away from even an indifferent home. The aim must be to find something better - indeed much better - if it takes the responsibility of providing a substitute home. The methods which should be available may be treated under three main heads of adoption, boarding out and residence in Communities. We have placed these in the order in which they seem to us to secure the welfare and happiness of the child".

The causes of a child being deprived of a normal home life may be manifold. There are innumerable orphans, nameless urchins, cripples, homeless and abandoned children and innumerable children displaced by war. So also are the children who are affected annually by the legal separation of their parents, the fact of easy divorce seems to threaten family life and the institution of marriage. The Curtis Report of 1946[17c] showed that even then 124,900 children were deprived of normal home life in England and Wales and the Clyde Report[17d] gave the figure for Scotland as 17,607. Also one of the chief reasons why a child became maladjusted or "unwanted" was illegitimacy. It is this problem which it was hoped that adoption would help to solve.

Thus adoption under the English law seems to spring from a different motive from that under the Hindu or the Roman and Greek laws. Under the former the force that is at work is the force of the social conscience. As an English authority on adoption has said, adoption "brings (inter alia) the homeless child to the childless home.[17e] Margaret Kormitzer remarks that adoption is far more than one more method of child care.

17c. Care of Children Committee Report, 1946. Cmd. 6922.

17d. Committee on Homeless Children (Scotland) Report, Cmd. 6911, 42.

17e. Quoted by Margaret Kormitzer in "Child Adoption in the Modern World (1952) p.4.

J.A. Boyd Carpenter, M.P. described it as'a fundamental social issue'and according to B. Janner, M.P. "Adoption Acts are intended to normalise the lives of individuals." For example, according to the figures quoted by T.E. James in 1962, there were 16,894 adoption orders, of which 13,826 related to illegitimate children.[18] Moreover, there is the fate of the human soul at stake and also the fate of the community of which he should be a better citizen. Good adoption, remarks Kornitzer, is good both for souls and for citizenship. She mentions some reasons why adoption should be popular today.[18a] In the first place, it salves public conscience in a number of ways and fills a public need and helps to solve the problem of dealing with some of 150,000 of England's children who need care and protection and secondly it serves to fill the child-hungry homes of people of high quality but low fertility. She opines that people in England rarely adopt a child to have an heir to perpetuate an ancient name or to ensure that filial rites are performed over their bier but rather due to reasons arising out of conditions of modern life, i.e. enormous numbers of childless marriages and secondly the tender social conscience towards the unwanted child that has grown up during the past 75 years. Love of children, says Margaret Kornitzer, is the key to good adoptions and advises people who do not like children in general to consider carefully before adopting a child in particular.

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18. Children and the Law: T.E. James (1965) p. 19.

18a Child Adoption in the Modern World by Margaret Kornitzer. pp. 12-13.

The Departmental Committee on Adoption of Children[18b] has also observed in its report that although adoption is a formal legal procedure it deals with very human problems. It focusses primarily on the needs and well-being of individual children for whom this peculiar form of substitute care is considered appropriate. It also assures the mother and father of an illegitimate child or a married couple, who because of circumstances relinquish their child, that the child has acquired the security of a normal life and secured for him a better chance in life than they themselves could give. For some childless couples, adoption can satisfy the basic emotional need to create a family and to care for and rear children. Above all the child is the focal point in adoption; providing homes in the fullest sense for children who need them is its primary purpose. The Committe observed[18c] that "there is a continuing need for adoption by which we mean the permanent legal transfer of parental responsibilities and rights." In England adoptions rose to a peak of 26,986 in 1968 and in 1969 there were 26,049 adoptions.[18c] If adoptions continued at this level about one million children would be adopted in the course of 40 years. There will always be some children who for various reasons cannot be brought up by their own parents or by relatives and for whom the permanence and security of adoption offers the best solution. It is thus clear, observes the Departmental Committee[18b] that there is a continuing need for adoption. The above observations of the Committee are to my mind absolutely true and are supported by the increasing demand for adoption of children as shown by statistics quoted above.[18c]

18b London 1970, pages 3 to 6.

18c Appendix B of the Dept. Committee on Adoption Report, London, 1970.

The various kinds of sons under the Hindu law

The ancient Institutes of the Hindus recognize a number of different kinds of sons. The several kinds of sons are enumerated and described by Manu[19] thus:

1. The Aurasa - 'Him, whom a man has begotten on his own wedded wife, let him know to be the first in rank, as the son of his body.

2. The Kshetraja - 'He, who was begotten, according to law, on the wife of a man deceased, or impotent, or disordered after due authority given to her, is called the lawful son of the wife.

3. The Dattrima - 'That (boy) equal (by caste) whom his mother or his father affectionately gives (confirming the gift) with (a libation of) water, in times of distress[20] (to a man) as his son, must be considered as an adopted son (Dattrima).

4. The Kritrima - 'He is considered as a son made (Kritrima), whom a man takes as his own son, the boy being equal in class, endued with filial virtues, acquainted with the merit of performing obsequies to his adopter, and with the sin of omitting them.

5. Gūdhotpanna - 'If (a child) be born in a man's house and his father be not known, he is a son born secretly in the house (Gudhotpanna), and shall belong to him of whose wife he was born.

6. The Apaviddha - 'He whom (a man) receives as his son, (after he has been) deserted by his parents or by either of them is called a son cast off (Apaviddha).

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19. Manu IX, 166-175 & 177-178; Also Yajn., II, 128-133; Vishnu XV, 1-29; Vasis XVII, 12-39; Baudhayana II, 2, iii (14-30) - he mentions one more viz., the Nishada, akin to Parasava, with this difference that the element of lust is absent in the former. Same view of Jimutavahana-Dayabhaga IX, 24-28.

20. I.e. if the adopter has, according to Kulluka & Raghavananda, no son, or if according to the commentator Narayana, the adoptee's parents are in distress.

7. The Kānīna - 'A son whom a damsel secretly bears in the house of her father, one shall name the son of an unmarried damsel (Kanina, and declare) such offspring of an unmarried girl (to belong) to him who weds her (afterwards).

8. Sahodha - 'If one marries either knowingly or unknowingly a pregnant (bride), the child in her womb belongs to him who wed her, and is called (a son) received with the bride (Sahodha).

9. Krītaka - 'If a man buys a (boy) whether equal or unequal (in good qualities), from his father and mother for the sake of having a son, that (child) is called a (son) bought (Kritaka).

10. Paunarbhava - 'If a woman abandoned by her husband, or a widow, of her own accord contracts a second marriage and bears (a son), he is called the son of a remarried woman (Paunarbhava).

11. Swayamdatta - 'He who, having lost his parents or being abandoned (by them) without (just) cause, gives himself to a (man), is called a son self-given (Swayamdatta).

12. Pāraśava - 'The son whom a Brāhmana, begets through lust on a Śūdra female, is (though) alive (pārayan), a corpse (śava), and hence called a living corpse, the 'Parasava'.

In the above list, the son of an appointed daughter is not included. But Manu says elsewhere "He who has no son may make his daughter in the following manner an appointed daughter (Putrikā), saying (to her husband) - 'The (male) child, born of her, shall perform my funeral rites'.[21] And later on, the sage lays down that the son of an appointed daughter is equal to a son's son.[22]

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21. Manu IX, 127.

22. Manu IX, 133, 139. According to Yajnavalkya, the putrika putra is equal to an Aurasa - Yajn. II, 128. In one sutra, Vasiṣṭha calls the putrika herself as equal to a son - Vasis. XVII, 15.

The ancient lawbooks of the Hindus assign the highest rank to the legitimate Aurasa son, begotten by a man himself on his lawfully married wife and the Putrikā Putra or the son of the appointed daughter who is declared by Manu[23] as equal to the son's son and by Yājnavalkya as equal to the Aurasa son himself.[22] But, besides the Aurasa son and the son of the appointed daughter, there are (as we have seen) enumerated in the Shāstras several kinds of secondary sons. With reference to these secondary sons, Brīhaspati says:

> "Of the thirteen sons mentioned in succession by Manu, the legitimate son of the body (Auraṣa) and the son of the appointed daughter (Putrikā) are the cause of lineage. ... As in default of ghee, oil is admitted by the virtuous as a substitute (at sacrifices) so are the eleven sons (admitted as substitutes), in default of a legitimate son of the body and that of an appointed daughter".[23]

Dr. Bhattacharya[23a] and Siromani[23b] divide the eleven subsidiary sons into the following three classes:

(1) One class consisting of those who are legitimate sons, but are held in low estimation on account of their mother being of a different caste or her being a twice married woman. In this class are the Paunarbhava, the Pārasava.

(2) The second class consisting of illegitimate sons of certain descriptions. These include the Kshetraja, the Gūḍhaja, the Kānina and the Sahoḍhaja.

(3) The third class consisting of sons acquired by gift, purchase etc. These are the five descriptions of sons by adoption. In two of the cases viz., the son given (dattaka) and the son bought (Krītaka) the boy was a

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23. Brihaspati XXV, 33, 34.

23a. Commentaries on Hindu Law by Jogendra Nath Bhattacharya (Third edn.), Vol. I, pp. 321 to 329.

23b. Commentary on the Hindu Law by J.S.Siromani (1885) pp. 107-112.

> minor and the right in him was given over by those who had dominion over him, and could be given over by no one else. In the case of the son made (Kritrima) the youth was of full age and therefore able to dispose of himself; and in the case of the son self-given (Svyamdatta) or cast off (apaviddha) he had been abandoned, or ill-treated by his parents or had lost them. Their dominion had accordingly come to an end.[24] The difference between Kritrima and Svayamdatta being that in the case of the Kritrima or son made, the offer comes from the adopter, while in the case of the self-given son the offer is made by him. An Apaviddha or deserted son is one who is abandoned or disowned by his parents and is adopted by a person as his son; this is like the appropriation by the finder of a thing without an owner.

As to the comparative excellence and inheriting capacity of the several sons, we have in Manu:

> "The legitimate son of the body, the son begotten on the wife, the son adopted, the son made, the son secretly born and the son cast off (are) the six heirs and kinsmen)'. 'The son of an unmarried damsel, the son received with the wife, the son bought, the son begotten on a remarried woman, the son self-given and the son of a Śūdra female, (are) the six (who are) not heirs, (but) kinsmen (i.e. do not inherit collaterally)."

It should, however, be observed that the order of precedence and inheriting capacity as thus assigned by Manu to the secondary sons is not the same with all the ancient jurists.[25] As regards the position of the adopted son, about half of the Smriti writers place him in the first list of heirs and

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24. Bandhayana ii, 2 § 13, 14, 16, 19, 21; Vasis XVII, 17-20; Vishnu XV, 18-26; Manu IX, 168, 169, 174, 177. Similarly in Rome there were two sorts of adoption, adoptio properly so called of a child who was under the dominion of another and adrogatio, of a person who was sui juris.

25. For instance see Vasis. XVII, 12-39; Bandh. 11, 2, 3, verses 31; 32; Narada XIII, 45-47, Gautama XXVIII, 32-33; Yajn II, 128-133.

kinsmen while the other half place him in the second list and regard him merely as a kinsman and not an heir. Thus Manu, Baudhāyana, Gautama, the Brahma-Purāṇa and the Kālikā Purāṇa consider him as an heir and kinsmen while Vasiṣṭha, Vishṇu, Yājñavalkya, Nārada, Śaṅkha and Likhita, Hārīta, Devalá and Yamá regard him as a kinsman but not an heir. So also in the case of the son made (the Kritrima) and the son cast off, whilst Manu, Gautama etc. regard them as heir and kinsmen, Yājñavalkya, Vasiṣṭha etc. regard him as a kinsman and not an heir. The various commentators have tried to harmonize the divergent points of view by assigning different reasons which are discussed subsequently. The cardinal principle of Hindu law is that whenever there is a difference between the Smṛiti-writers, the views of Manu are to be accepted, as Manu is stated to have a perfect knowledge of the import of the Vedas and to be the most competent to give a correct interpretation. According to the sages Bṛihaspati and Angīras, texts which conflict with Manu's are to be set aside, since Manu occupies the paramount position among Smriti writers. As is shown subsequently in this thesis, the Courts in India have held that the adopted son is entitled to inherit collaterally.

Bṛihaspati[26] regards only two sons viz. the Aurasa (one's own) son and that of the appointed daughter as entitled to inherit, the rest being merely kinsmen and so relegated to the second class adding "The sons made in various ways by the ancient Rishis, the powerless modern people have not the power to make in the Kaliyuga (or the present age)".[27] Further

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26. 2 Dig. 343.

27. Cited in Datt. Mim; I, 64.

Bṛihaspati says "No one but a legitimate son of the body is declared to be heir of his father's wealth. An appointed daughter is said to be equal to him. All the others are stated to have a claim to Maintenance (only)'. 'The son given, the son cast off, the son bought, the son made, the son by a śūdra wife, these, when pure by caste and irreproachable as to their conduct are considered sons of middle rank".[28] The Dattaka Mīmāṃsā quotes Bṛihaspati's text (XXIV, 14)[27] and says that on account of this text of Bṛihaspati and because in the passage "There is no adoption, as sons, of those, other than the son given and the legitimate son etc.", other sons are forbidden by Śaunaka in the Kali Age - the son given and the legitimate son only are admitted. The author of Dattaka Mīmāṃsā further says[29] "The term 'given' is inclusive also of the son made (Kritrima), on account of a text of Parāśara, when treating of the law of Kali Age. "The son of the body (Aurasa) and the son of the wife, also, the son given, the son made etc."[30]

Comparison of the various sons under Hindu law with the sons adopted under the Western Systems:

Modern authors on Hindu law, following decisions of courts, maintain that of the various kinds of sons, all, except the legitimate and the adopted son, are long since obsolete. They say that as days went on, and better order reigned in society, the number of subsidiary sons mentioned above diminished

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28. Brihas XXIV, 12-14; XXV, 33-35; 40.

29. D.M.I., 65.

30. This alleged text of Parāśara is, however, not found in Parasara's works.

with the increasing abhorrence to the sexual looseness which characterised the recognition of many of them. But, while, in the Eastern hemisphere the Aurasa and Dattaka assumed overwhelming importance, we find that in the Western World, adoptions of children very much akin to the other kinds of sons we come across in Hindu law have become quite popular. According to Margaret Kornitzer approximately 2/3 of the children adopted in England are illegitimate ones and most of them are adopted by their natural mothers,[30a] generally in conjunction with their spouse whom they subsequently marry. Several marriages of pregnant brides take place in England and elsewhere among the putative parents resulting in legitimisation of their issue. These could very well be compared to the Kānīna and the Sahodha sons under the old Hindu law. Adoption of cast off children is also not infrequent in the western hemisphere, akin to the Apaviddha or the son cast off. Again the 'son made' is common in some Western countries. We thus see that the adoptions made throughout the world even in modern times can be comprehensively classified according to the 11 kinds of sons known to Hindu law. Rules of Hindu law regarding the different kinds of sons could be studied with interest and possibly with advantage in Western societies with whom adoption is a comparatively new and a growing subject. Thus the law laid down by Manu with respect to the Unmarried daughter's sons (Kanina sons)[30b] i.e.; that such offspring of an unmarried girl belongs to him who weds her (afterwards),

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30a. Child Adoption in the Modern World (1952) by Margaret Kornitzer, pp. 12-13.

30b. Refer to Manu's definition of Kanina given on page 12 above.

appears to me to be a very wholesome provision especially from the point of view of the child's welfare. If this proposition is incorporated into law the status of such children in public esteem would be much improved and would go a long way in abolishing the distinction between legitimate and illegitimate children. Incidentally it may be mentioned here that the Departmental Committee on Adoption of Children 1970, has proposed that the legitimate and illegitimate children should be treated similarly in law, which is discussed subsequently[30c] and with which proposition I am in general agreement.

Adoptions - how far recognised in various countries of the world.

Adoption was a well-established institution in the ancient civilizations in India, Greece and Rome. The object of adoption in all these countries was the perpetuation of the family and the continuance of the religious, obsequial and family rites.

The practice of adoption found its way to Rome from

30c. See pages 46 to 47.

Greece through the Decemvirs. The end and conditions of it were in all main particulars the same as those in India.[31] The introduction of adoption into Athens is attributed to Solon[32] who travelled very widely in the early part of his life. As little is known about his travels Mr. J.L. Kapur poses the question whether the institution of adoption was imported by Solon, mediately or immediately from India?[33] In Rome adoption was a favourite institution and some of the Roman emperors appointed their successors by adoption. Julius Caesar adopted his grand nephew Augustus (Octavianus) and also the great Roman Emperors Nerva, Trajan, Hadrian and Marcus Aurelius profited from this institution. As in the Hindu law, so also in the Roman law the adopted son took all the rights and obligations in his adoptive family which he would have had he been born in it. In the eye of law there existed no difference between him and those who became his adoptive brothers. Adoption was also admitted in China[34] and to a lesser extent in Babylon[35] and Assyria. In China hsiad 'filial piety' indirectly gave extremely wide powers to the lineal ancestor.[36] The modern Chinese law, under the People's

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31. I. Str. H.L. 103; The law of adoption in Indian and Burma: J.L. Kapur (1933 edn.) p. 637.

32. I. Str. H.L. p. 105.

33. J.L. Kapur: The law of adoption in India and Burma (1933) p. 638.

34. Dr. Jamieson, Chinese Family and Commercial law, 1921, pp. 3, 24; Derret: Adoption: A Preliminary Study, S.O.A.S.

35. Driver & Miles, The Babylonian Laws, Oxford 1952, pp. 383, 385. Also by the same authors Assyrian Laws, Oxford 1935, pp. 222-3; Derrett: Adoption: A Preliminary Study, S.O.A.S.

36. McAleavy: Certain aspects of Chinese Customary law (1955) XVII, B.S.O.A.S. 534, 542; Derrett: Adoption: A Preliminary Study, S.O.A.S.

Republic of China, hardly recognises the religious motive, it now views adoption rather from the secular angle.[37] Though the Jewish Law knew of informal adoptions, in classical times it refused to admit adoption since it would openly frustrate certain divine commands, such as those relating to inheritance. In Israel, however, despite the outlook of the Rabbinical law, 'lawfully adopted' children were allowed to succeed.[38] Prof. Derrett in his 'Adoption: A Preliminary study' remarks in this connection

> "For continental and American Jews domiciled in Israel will not lightly cast away an institution useful to them personally and to a nation which has many orphans to care for. The shape of the Israeli adoption law itself has yet to be adumbrated".[38]

Israel has recently (in 1960) legally recognised adoption.[38a] S. 13 of the Adoption of Children Law 5720-1960 deals with the effects of adoption. It lays down that the adoption creates between the adopter and the adoptee the same duties and rights as exist between parents and their children and confers upon the adopter, in respect of the adoptee, the same powers as parents have in respect of their children, it terminates the duties and rights between his parents and other relatives and the powers they have in his respect; however

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37. The code of 1930 and its amendments were not enforced throughout China. McAleavy, opin. cited., p. 535. It was only with the coming into existence of the present regime in 1949 that a real effort was made to enforce the reformed law. Under the code adoption was reformed so as to approximate more closely to the contemporary civil law pattern: Derfett: Adoption: A Preliminary Study, S.O.A.S.; Estudio preliminar sobre la adopcion: Instituto de Derecho comparado: Barcelona, 1956.

38. Derrett: Adoption: A Preliminary Study, S.O.A.S. See under Note 37 above.

38a. The Adoption of Children Law 5720-1960 - (Laws of the State of Israel Vol. 14, p. 93).

(1) a Court may restrict the said effects in the adoption order; (2) the adoption shall not affect any legal prohibition or permission as to marriage or divorce.

As regards the various other countries of the world, most of the countries of Continental Europe such as Austria, Italy, Spain, Switzerland, Germany, France etc., have introduced adoption laws during the past seventy years.[39] In Japan also an adopted son gets the status of a legitimate son.[40]

Adoption also exists in the various provinces of Canada, Australia, New Zealand, S. Africa, etc. In the United States in Louisiana, California and Texas adoption has always existed being introduced via the French and the Spanish law.[41] The States of North America were influenced by Louisiana and Texas and the first adoption law was that of Massachusetts in 1851 but the remaining states followed slowly.

In England adoption was first legalized in 1926, its effects were considerably enlarged in 1949 and the law was consolidated in the Adoption Act of 1950.[42] The Scots adoption law,[43] was according to Prof. Derrett,[44] a travesty of adoption, giving no property rights to either party. 'It is very doubtful'

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39. Civil Code of Austria 179-86; Italy 202-19; Spain 173-9; Switzerland 264-95; French 343-70; J.K. Kapur, Adoption Law (1933) p. 634.

40. Civil Code of Japan 837-76.

41 Sherman's Roman law Vol. I, Ss 263 and 309; see Sherman's Roman Law Vol. II, p. 86.

42. 16 and 17 G.V.C. 29.

43. Adoption of Children (Scotland) Act 1930 = 20 and 21 G.V.C. 37 not materially improved by the Adoption Act 1950.

44. Derrett: Adoption, a Preliminary Study: S.O.A.S.

observed Derrett, 'whether it is adoption al all, but since it satisfies the motives of giving a child a settled affection it probably qualifies as adoption'. The position has now been changed by Sections 23 and 24 of the Succession (Scotland) Act 1964 according to which for all purposes relating to the succession of a deceased person (whether testate or intestate) and the disposal of property by deed, an adopted person shall be treated as the child of the adopter and not as the child of any other person.[45] These sections apply to adoptions made whether before or after Sept. 10, 1964 but only to deeds executed or deaths occurring after that date.[46]

Adoption under Muslim Law

Adoption is not recognised by the Islamic law. The following texts of the Koran deal with this subject:

> "God hath not made for any man two hearts in his inside; nor has he made your wives - whom you back away from - your real mothers, nor has he made your adopted sons your real sons. That is what ye speak with your mouths, but God speaks the truth, and he guides to the path";

and

> "Call them by their fathers' names; that is more just in God's sight; but if ye know not their fathers, then they are your brothers in religion and your clients".[47]

A tradition of the prophet relates that he placed a curse on those who should cease to acknowledge as father their real

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45. Under S. 23(3) however, the property limited to devolve with a title of honour is an exception.

46. S. 23(4). Dicey: Conflict of laws: 8th edn. p. 471. Also see Gloag and Henderson: Introduction to the Law of Scotland (Seventh edn.) 1969, page 581 and pages 691-692.

47. Koran XXXIII, 4 and XXVII (Palmers translation).

fathers and should call others their fathers.[48] Prof. Derrett observes that the Islamic law, developing much later than the last period in which the Corpus Juris was in vigour and in regions where its influence had never been acknowledged undiluted by local customs, was content with charity, with acknowledgment of kinship and with oath-brotherhood, and that the peremptory Quranic rules concerning inheritance did not contemplate adoptive relationships.[44] In Muhammad Allahdad Khan v Muhammad Ismail[49] Mahmood J. observed as follows:

> "Where legitimacy cannot be established by direct proof of such a marriage, acknowledgment is recognised by Mohammedan law as a means whereby marriage of the parents or legitimate descent may be established as a matter of substantive law. Such acknowledgment always proceeds upon the hypothesis of a lawful union between the parents and the legitimate descent of the acknowledged person from the acknowledger, and there is nothing in Mohammedan law similar to adoption as recognised by the Roman and Hindu systems, or admitting of an affiliation which has no reference to consanquinity or legitimate descent. A child whose illegitimacy is proved beyond doubt, by reason of the marriage of its parents being either disproved or found to be unlawful, cannot be legitimated by acknowledgment. Acknowledgment has only the effect of legitimation where either the fact of the marriage or its exact time, with respect to the legitimation of the child's birth, is a matter of uncertainty".

In Mahomed Umar v Niazuddin[50] their Lordships of the Privy Council observed that under the general Mahomedan law an adoption cannot be made, and even if it be made, can carry with it no right of inheritance. It was further observed that even if an adoption by a Mahomedan was permissible by any

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48. The matter is summarised in the Appendix to Ancel's work; Derrett: Adoption: A preliminary study: S.O.A.S.

49. (1888) 1 L.R. 10 All. 289.

50. (1912) 1 L.R. 39 Cal. 418 (P.C.).

valid custom in the Punjab, the Chief Court found that it had not been proved that the parties to the suit belonged to a family to which the Punjab Agricultural or other similar restrictive customs must be presumed to apply. In Jeswant Sing-Jee v Jet Sing-Jee,[51] a Mahomedan, by deed, declared that he had adopted a son "who was to succeed to his property and title". It was held, on appeal, to be inoperative and void, either as a deed of gift, or as a testamentary disposition, no delivery of possession and relinquishment by the donor or seisin by the donee having taken place. Bai Machhbai v Bai Hirabai,[52] was a case of Girasias, Parmer Rajputs converted to Mahomedanism. Their Lordships of the Bombay High Court observed in this case, that on the question of adoption, the burden of proof lay in the first instance upon the appellant. His case was that the Girasias, when they became Mahomedans, carried with them the law of inheritance and succession, and that, as part of that law, they also retained the Hindu law and custom of adoption. But their Lordships observed that adoption is not necessarily inheritance or succession, although it leads to inheritance or succession. The Mahomedan law does not recognise adoption. Hence where a Hindu is converted to Mahomedanism, their Lordships observed that the presumption is that as a necessary consequence of conversion the law of adoption recognised by Hindu law has been abandoned by him. He who alleges that the usage and law in question had been retained must prove it.

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51. (1844) 3 M.I.A. 245, 258.

52. (1911) I.L.R. 35 Bom. 264 (Garasias, Parmer Rajputs).

A similar decision was made by the Mysore High Court in Elia Sait v. Dharanayya.[53] which was a case of Cutchi Memons, converted to Mahomedanism. The Cutchi Memons were governed by the Hindu law in matters of succession and inheritance. But the scope of applicability of Hindu law to Cutchi Memons, observed their Lordships, should be limited to succession and inheritance.[54] Their Lordships observed that under the general Mahomedan law, an adoption cannot be made. The presumption was that as a necessary consequence of conversion to Mahomedanism the law of adoption recognized by Hindu law and usage had been abandoned by Cutchi Memons and those who alleged that the law of adoption had been retained by usage must prove it. It was held further that Cutchi Memons in Mysore had not proved a custom of adoption among them.

In Sohan Lal v. A.Z. Makuin[54a] it was observed (on appeal) by their Lordships of the Punjab High Court that Section 2 of the Indian Succession Act makes an exception in the case of a local law, ans so far as the Punjab, S.5, Punjab Laws Act, does provide an exception. It was therefore

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53. (1931) 10 Mys. L.J. 33 (Cutchi Memons).

54. Hazi Oosman v. Haroon Saleh Mahomed (1922) 47 I.L.R. Bom. 369 and Advocate Gen. of Bom. v. Zimbabai (1915) 41 I.L.R. Bom. 181, referred to.

54a A.I.R. (1929) Lah., 230.

open to a party to prove that according to the custom applicable to the parties, an Indian Christian in the Punjab was entitled to make a valid adoption so as to change the rule of succession laid down in the Indian Succession Act[54b]. In the opinion of their Lordships, even if it be permissible to the defendant to prove a custom of adoption applicable to the Indian

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54b. See also article by Sivaramayya, B., Adoption: An Anomaly under the Indian Succession Act, (1960) S.C.J. J, 201, where the author observes that the literal construction of the Act and the trend of judicial decisions leave no doubt that an adopted child is not entitled to succeed on intestacy under the Indian Succession Act, suggests amendment of the law by the legislature in this respect.

Christians generally the evidence produced was not sufficient to establish such an important variation from the ordinary law which governed the parties.

In Hassan v Samma, a case from Hissar in Punjab it was held that a Muhammadan childless village land-holder had the power to adopt like Hindus.[54c] Also an adoption by a Jagirdar was recognised by the Govt. of India, provided it was satisfied that the person adopted was the real choice of the Jagirdar and his family.[54d]

Sources of Hindu law and the law of adoption

According to the original Hindu conception law (Dharma) is not based upon the authority of Kings and Parliament or on the authority of people at large. Morality, virtue and law are based on the idea of the good. The few good and wise men try to give expression to it and realize it in life. The multitude are constrained to follow their example. The Vedic Rishis place law (Dharma) even above the divine sovereign. The Upanishad declares "Law (Dharma) is mightier than the Kings, therefore there is nothing higher than the law. By its means even a weak man rules a stronger".[55] The sources of Dharma as mentioned by Manu are as follows: "The whole Veda is the first source of the sacred law, next the Smritis and the virtuous conduct (shīla) of those who know the Veda; further also the

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54c. (1874) P.R. No. 54; also Kapur: Adoption in India and Burma (1933) p. 44.

54d. Letter No. 2158-1 dated Simla June 1, 1885, from Mr. H.M. Durand, Secretary to the Government of the Punjab quoted in Kapur's: Adoption in India and Burma (1933) p. 44.

55. Bṛih. Āran. Up. I IV, 14.

customs of holy men, and finally self-satisfaction".[56] Similar is the view of other Smṛiti-writers. According to Bhṛigu (Manu II, 7) "whatever Dharma has been expounded by Manu has all been set forth in the Veda". The question therefore may arise that when the Smriti itself only expounds whatever is already set forth in the Veda, and is on that account, based upon the Veda, then the Veda itself being sufficient for all purposes, what is the use of the Smṛiti or Dharmaśāstra? The Smṛiti Chandrikā quotes Mārīchi as giving the answer to this question. "The requisite texts of the Vedas are difficult to understand and are scattered about in various places; and all these are collected and explained by the Smritis".[56a] Thus next after the Vedas, and for all practical purposes, the Smritis are the chief source of Dharma. Among the Smritis, the Smriti of Manu occupies a pre-eminent position. The Vīramītrodaya quotes a text of Bṛihaspati declaring that a Smṛiti opposed to Manu has no authority. "Inasmuch as the Smriti of Manu is compiled on the basis of what is laid down in the Veda, it is regarded as most important and a Smṛiti that goes against what is laid down by Manu should never be accepted".[56a] According to Kumārila "Barring

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56. Manu II, 12.

56a. G. Jha: Hindu Law in its Sources I, 17, 43, 44.

the Smṛiti of Manu, all others are restricted in their authority". The Mahābhārata selects Manu for special mention as one whose teachings should not be controverted. In the Veda itself the pre-eminence of Manu is declared in these terms "Whatever Manu says is medicine for mankind".[56b] Bṛihaspati and Angīras declare that where there is a conflict between the code of Manu and another Smṛiti the former is to be accepted. The laws of Manu, according to Manu himself, were taught to him at the beginning of creation by the Creator Himself. "But He having composed these Institutes (of the Sacred Law), himself taught them, according to the rule, to me alone in the beginning. Next I(taught them) to Marichi and other sages".[57] A passage from the Rig Veda reads as follows "Do not take us far away from the ancient path prescribed by Manu which have come down to us from our fathers".[58] Thus the Manu Smriti is believed to be the

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56b. Tai. Sam. II. 2.10.2. referred to in Kane: History of Dharmasāstra Vol. I, p. 136.

57. Manu I, 58.

58. Rig Veda VIII. 30, 3.

paramount authority next to the Vedas, the chief source of Dharma. Next to the code of Manu, the Yājñavalkya Smṛiti appears to have received the largest share of attention on the part of mediaeval law-writers. The number of commentators on Manu is large - more than six have already been published - Kulluka Bhaṭṭa, Medhātithi, Govindarāja being some of the commentators. Similarly Yājñavalkya also has had several commentators.

The Mitakshara by Vijñāneśvara had early become the standard work on law in the greater part of India and its influence on the administration of justice had been increased under the British rule. No third Smriti has had the honour of having so many commentators. In fact the only other Smritis known to have a real commentary are those of Parāsara, on which we have the Parāśaramadhava, and of Narada, Vasiṣṭha and Viṣnu. The Smriti of Yajnavalkya gives a list of twenty sages as law-givers and the Mitakshara explains that the enumeration is only illustrative. According to Manu[59] where two Shruti texts are mutually contradictory both are right i.e. the two

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59. Manu II, 14.

courses laid down are to be treated as optional alternatives. According to Gautama where there is a conflict between Shruti and Smriti the latter is to be rejected, so also where custom conflicts with Smriti the former is rejected.

As to the third source of law viz., Sadāchāra or the practice (or custom) of the virtuous, Vijñāneśvara and Kullūka commenting on Yājñavalkya and Manu state that Sadāchāra or custom should not be opposed to the Vedas.

A perusal of the rules for proof of custom followed by modern Indian Courts would show that in many instances they contradict each other. For instance in earlier cases it was laid down that custom must be established by satisfactory evidence of instances which must be ancient and certain[60]

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60. Rhagvandas v. Rajmal (1873) 10 Bom. H.C.R. 241, Rama Nand v. Surgiani (1894) I.L.R. 16 All. 221; Vannia Kone v. Vannichi Ammal (1927) 51 I.L.R. Mad. 1. Also in a case on proof of an ancient adoption it was held in L. Debi Prasad v. Smt Tribeni Devi A.I.R. 1970 S.C. 1286 that in the case of a Hindu, long recognition as an adopted son raised a strong presumption in favour of the validity of his adoption, arising from the possibility of the loss of his rights in his own family by being adopted in another family. In the case of an ancient adoption evidence showing that the boy was treated by relatives, including the person who later on challenges the same, for a long time as the adopted son at a time when there was no controversy was sufficient to prove the adoption although evidence of actual giving and taking was not forthcoming.

whilst in subsequent cases it was laid down that usage need not be immemorial in the sense of the word used in English law[60a] and in case of communities which do not follow Hindu law such as Jainas etc., instances 20 or 30 years old raised a presumption of antiquity.[61] In Madhavrao v. Raghavendra Rao, Kania Ag. C.J. and Gajendragadkar J. extended this rule to a case between persons who were governed by Hindu law, the parties in this case being Brahmins.[62] Again in some other cases it was held that even the evidence as to the existence of customs given by members of the family or the community, if not contradicted by other evidence should not be disregarded.[63]

60a. Subhani v. Nawab (1941) 43 Bom. L.R. 432.

61. Chimanlal v. Hari Chand (1913) 40 I.A. 156; Parshottam v. Venichand (1921) I.L.R. 45 Bom. 754.

62. A.I.R. 1946 Bom. 377. Both these Justices Kania and Gajendragadkar later rose to be Chief Justices of the Supreme Court of India.

63. Ahmad Khan v. Channi Bibi (1925) 52 I.A. 379; Ajai Verma v. Vijai Kumary (1939) 41 Bom. L.R. 700 (P.C.).

The sanskrit word for custom is sadāchāra or 'custom of the virtuous' or those learned in the vedas. A practice set up by the vicious or ignorant which by lapse of centuries could well claim to be 'custom', the 'Durachar' origin of the rule being forgotten but if such customs were enforced, it would be no better than a case of the blind leading the blind. To the Mīmāṃsakas the fundamental basis of custom is that the custom should not contradict the Smṛiti and if it does so, the custom is void and is set aside under the rule that it interferes with the Smriti. Kumārila deals with this question specifically in one of his interpretations on Sutras 8 & 9, Pada iii, Adhyaya 1, "Smriti is more authoritative than usage because it is based directly upon the Veda; it leads directly to the inference of its corroborative text, while in the case of usage, the first necessary inference is that of the corroborative Smṛiti and it is in support of this inferred Smṛiti text that the corroborative Vedic text is inferred, so that the support of the Veda for usage is one step further removed than in support of the Smriti itself. Then again, the Smriti has been compiled by persons well known as steeped in Vedic lore which fact lends strength to that work. In the case of usage, on the other hand, its exact source is always indefinite and unascertainable which fact weakens its authority".[64] This rule has therefore another basic principle underlying it. The sphere of custom is beyond the sphere of the Smṛitis. Custom begins its operation where Smritis do not speak. The Mīmāṃsaka had to decide the question "Does this custom satisfy the

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64. Ganganatha Jha - Pūrva Mīmāṃsā in its sources pages 235-236. The topic is also discussed by Kane: History of Dharmaśāstra Vol. 3 pages 825 et seq.

Mīmāmsā
Mimamsa rule of not infringing the Smriti injunction?" If it did not then the custom is valid. Again Kumarila says

> "When we find that certain actions are performed by good men and we cannot attribute them to any such perceptible motives as greed and the like, they should be accepted as Dharma. Such actions as are performed either for the maintenance of the body or for one's mere pleasure or for some material gain are not considered by good people as Dharma. It is only men's actions that are held by the good people to be Dharma and are performed as such that are accepted as Dharma; because the persons that perform these are the same as those who perform the sacrifices in the Veda".[65]

Thus, it is not that all acts of good men are taken as the basis of Dharma, but only such acts believed by them to be good and in accordance with the direct teaching of the Vedas that are taken as the basis of Dharma. The good people have from time immemorial acted in keeping with the scriptures and hence people coming to recognise the authoritative character of such practices take those practices as the basis of Dharma.

Nataraja Ayyar[66] compares the Mīmāmsā rule of Interpretation and the rules of law adopted by modern courts in the administration of Hindu law

> "The Mimamsa Rule of Interpretation may be compared to the English rule where a custom must not be contrary to an Act of Parliament. In a broad sense we may compare the Smriti to an Act of Parliament. In the words of Coke, 'no custom or prescription can take away the force of an Act of Parliament'. By no length of desuetude can a statute become obsolete or inoperative in law and by no length of contrary usage can its provisions be modified in the smallest particular. The common law will yield to immemorial custom but the enacted law stands for ever".

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65. Kumarila's Vartika quoted by A.S. Nataraja Ayyar in his 'Mīmāmsā Jurisprudence' pp. 49-50.

66. A.S. Nataraja Ayyar 'Mīmāmsā Jurisprudence' p. 62.

I think that this view appears to be nearer the original intention of the Smriti lawgivers as to the place of custom in Hindu law. Prof. Derrett, however observes that this will emasculate the function of custom. Freedom of religion - freedom of Jurisprudence is the attitude of the courts, which mingle de jure and de facto considerations.[67]

The Commentaries

The writing of the Smritis was followed by the writing of a large number of commentaries and digests based upon them. The two principal commentaries on which the modern Hindu law is based are the Mitākharā which is a running commentary on the code of Yajnavalkya and is said to have been written by Vijñāneśvara in the 11th century A.D. and the Dāyabhāga of Jīmūtavāhana. The latter is not a commentary upon any code but purports to be digest of all the codes, though it deals with the subject of partition and inheritance only. The Mitākharā is of supreme authority throughout the whole of India except Bengal. The Dāyabhāga is of paramount authority in Bengal, Assam and Manipur. In Bengal also the Mitākharā is considered as a great authority in all matters in respect whereof there is no conflict between it and the Dāyabhāga. Outside Bengal the Dāyabhāga may also be consulted in matters on which the Mitākharā is silent. Although the authority of Mitākharā was recognised throughout the whole of India except Bengal, certain other treatises and commentaries subsequently came into the field which though generally accepting the Mitākharā interpretation of the Smritis differ from it on certain points.

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67. Religion, Law and the State in India: J.D.M. Derrett. (London 1968) Chapters 6, 9 + 13. Also pp. 304-5 & 480-1.

The following are the various sub-schools and the principal works of authority in the sub-schools.

1.	Benaras School -	1. Vīramitrodaya (by Mitramisra) and 2. Nirṇayasindhu (by Kamlākara Bhaṭṭa)
2.	Mithila School -	1. Vivāda Chintāmani (by Vāchaspati Misra) and 2. Vivāda Ratnākara (by Chandesvara)
3.	Bombay or Maharashtra School -	1. Vyavahāra Mayūkha (by Nilakantha Bhaṭṭa) and 2. Nirnayasindhu (by Kamalakar Bhaṭṭa)
4.	Madras School -	1. Smriti Chandrikā (by Devanna Bhatta) and 2. Parāsara Mādhaviyam (by Mādhavāchārya)

In addition to the sources and authorities mentioned above, two treatises viz., the Dattaka Mīmāṁsā and the Dattaka Chandrikā have been regarded as works of special authority on the Hindu law of adoption. These two treatises were translated and published by Mr. Sutherland in 1821. As the lawyers of those times knew little of original books on Hindu law, these two books, being the only two translated books on adoption, came soon to be recognized as of para mount authority in India. The Dattaka Mīmāṁsā is by one Nanda Pandita. It appears to be written on purpose to invalidate the affiliation of a daughter's son and Golap Chandra Sarkar Sasti doubted whether it was really by Nanda Pandita and said that 'the biased and forced arguments advanced by its author in support of the innovations introduced by him, especially in the second section, give rise to a suspicion that it is similar to the Dattaka - Chandrikā as regards its origin. The character of the work

has been judicially considered by a full bench of the Allahabad High Court presided by Sir John Edge, the Chief Justice, who has in an elaborate and exhaustive judgment dealt with the matter and come to the conclusion that the innovations introduced by Nanda Pandita should not be followed as binding rules. The majority of the judges have concurred in that, but the minority would follow the maxim communis error facit jus, and hold that the Dattaka-Mimamsa is binding, because it has several times been erroneously asserted to be a work of paramount authority on questions of adoption.[68] The Judicial Committee of the Privy Council, however, have set aside the view of the majority, and upheld that of the minority on grounds of stare decisis and communis error facit jus.[69] Justice Knox who was a sanskrit scholar held that their authority was open to examination, explanation, criticism, adoption or rejection like any scientific treatises on European jurisprudence. But the Judicial Committee observed that their Lordships could not concur with that learned judge because "such treatment would not allow for the effect which long acceptance of written opinions has upon social customs, and it would probably disturb recognised law and settled arrangements". Their Lordships however add - "But as far as saying that caution is required in accepting their glosses where they deviate from or add to the Smritis, their Lordships are prepared to concur with the learned judge".[70]

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68. Bhagwan Singh v Bhagwan Sing (1895) I.L.R. 17 All 294 = 15 A.W.N. 167.

69. (1898) L. R. 26 I.A. 153 = 3 C.W.N. 454 = 1 Bom. L.R. 311.

70. Sri Balusu v Sri Balusu (1898) L.R. 26 I.A. 113, 132 = 3 C.W.N. 422.

As for the Dattaka-Chandrika, many authors including Golapchandra Sarkar Sastri[71] and J.C. Ghose[72] consider it as a literary forgery fabricated by one Raghumaṇi a pundit of Colebrooke to help the plaintiff in the famous case of Gopee Krista v Radhakant[72] (to lay down the rule that in case of Sudras the adopted son takes equally with an after-born son). Prof. J.D.M. Derrett considers the work to be genuine.

In his "Religion, Law and the State in India" Prof. Derrett observes

> "H.C. Sutherland has been blamed for having chosen the D.-C and the Dattaka Mimamsa, as if they were taken at random from a wide selection of texts on adoption in order to make his translations of original works on that subject. The truth may be that the Dattaka - Candrika was so highly regarded on its merits that any question regarding its authorship could be neglected. Two recent ed editors of the text take it as genuine though nothing is known of the author, and the present writer is inclined to think that the rumours in Calcutta were false. The Calcutta High Court acknowledged the works authenticity[72a] in 1917 and the Supreme Court of India has not reopened the question when opportunity to do so presented itself".[72b]

Judicial Decisions have played a considerable part in ascertaining and sometimes in developing and crystallizing Hindu law. Almost all the important points of Hindu law are now found in the law reports and to this extent it may be said that the decisions on Hindu law have superseded the comment-

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71. A treatise on Hindu law: G.S. Sastri - Chapter on adoption. Vol. I (3rd edn.)

72. Principles of Hindu law: J.C. Ghose/- Chapter on adoption. p. 664.

72a. Asita Mohun v. Nirode Mohun A.I.R. 1917 Cal. 292.

72b. Religion, Law and the State in India: J.D.M. Derrett (1968) p. 256.

aries. The decisions of the Privy Council and the Supreme Court are binding on all the Courts of India and these decisions immediately affect the parties to the suit but as precedents they are binding on the entire community. The view of law enunciated and expressed by the Privy Council and Supreme Court in particular cases serves as a guide in similar cases arising subsequently and is taken to have a binding force, but the decisions of any one of the High Courts are not binding on any other High Court, though they are binding on their respective subordinate courts.

Statutes of the legislature as a source of Hindu law

Enactments of the legislature declaring, abrogating or modifying rules of Hindu law are an additional and modern source. They have been an important factor in the development of 'modern Hindu law'. Most of them are in the direction of 'reform of Hindu law' and some of them supersede Hindu law in certain classes of cases. Fundamental and radical changes have been made very recently by the following enactments. The Hindu Marriage Act 1955; The Hindu Succession Act 1956; The Hindu Minority and Guardianship Act 1956 and The Hindu Adoption and Maintenance Act 1956. The Hindu law, had, prior to 1955 been modified and supplemented in certain respects by various acts relating to marriage and Inheritance. Other enactments applied to all the communities in India in matters relating to contracts, transfer of property, evidence and criminal law.

Legal recognition of adoption in England

In England, legal recognition has been given to adoption only very recently in 1926. Before 1926 the law in

the United Kingdomw, did not recognize in any way rights of people taking children permanently into their homes as members of their family and there was a great clamour for legislation prior to 1926 and also there was a militant desire to improve the lot of unfortunate children. Prof. James observes that the Adoption Act of 1926 envisaged legal adoption in the nature of an experiment. Its objects were to prevent the natural parents subsequently claiming the child and to secure for the child a form of guardianship by the creation of an artificial relationship in another family.[72c] Within a quarter of a century, from the first passing of the Adoption Act, not only four separate Acts[72d] of Parliament governing adoptions in England and Wales were passed but also a host of changes in regulations affecting child welfare and child protection were passed. The public became conscious of the need to protect children against those who sought to hurt or make capital out of them. The approaches to adoption in Britain are well guarded and it is impossible to enter lightly into an adoption. The governing principle for adoption was laid down by Viscount Simon who sponsored the Adoption of Children Act, 1949 as "What is best for the child in each individual case. That comes in front of everything else".[72e] According to Margaret Kornitzer,[73] "The

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72c. T.E. James: Children and the Law (1965) p.18.

72d. i.e.; Adoption of Children Act, 1926; Adoption of Children (Scotland) Act, 1930; Adoption of Children (Regulation) Act 1939 and Adoption of Children Act, 1949.

72e. Child Adoption in the Modern World: Margaret Kornitzer, P. XII (1952). In Hindu law also most careful consideration is given to the destination of the child by laying down that no child is given or taken in adoption without mature consideration by both sides. See Kane: History of Dharmasastra (1946) Vol. III pp. 666-674. Also Derrett: Introduction to Modern Hindu Law (1963), pp. 96 to 111.

73. Child Adoption in the Modern World: Margaret Kornitzner, P. XIII (1952).

stable family relationship created by the Adoption Act is not more than a generation old and is still on trial and we still do not yet know a great deal about the long-term social value of adoption by large numbers of people ... Thus every adoption is a great adventure, not only for the individuals concerned but for the community at large. If they come to the task with love they are unlikely to go badly wrong". Also Professor Derrett in his 'Adoption in Hindu Law'[73a] observes "England very recently placed adoption upon a sound footing with a thorough going statute,[74] intended for the benefit of infants, and in so doing unconsciously brought its law into the closest analogy with the Hindu law of adoption, than which no other system resembles it more remarkably so far as the effects of the Institution are concerned". Although, curiously, both an English judge and a bench of Indian judges agreed independently that adoption in India (i.e., amongst Hindus) and adoption in England were poles apart, yet the similarities, judged comparatively, are more striking than the differences, however important the latter may be.[75] Professor Derrett further makes the following observation regarding the Hindu law of adoption:[73a]

> "Alone of the ancient systems which found a use for adoption, the Hindu law provides us with a copious literature on the subject and protracts the developments and disputes of the remote and more recent past into the present, when the institution is currently (1955-6) passing through the fire of codification. India alone provides

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73a. Zeits. fur. verg. R. 60 (1957) pp. 34 to 36.

74. Adoption Act 1950 = 14 G. VI. C. 26.

75. See Derrett Conflict of Laws: Adoption and a difficult Bombay decision, (1956) 58 Bombay Law Reports, 33 et seq.

> us with a sufficiently varied amount of information about the original introduction of the institution, its conflict with existing comparable institutions, and its eventual triumph over them, for us to be able to view the process in a single glance; and India alone of all countries is struggling with the desire to reform an essentially archaic and utilitarian institution at a time when most countries have lost the belief that adoption can, or ought to, serve any object but a charitable one".

As regards the observation of Prof. Derrett in the last few lines of the above quote to the effect that in most countries (other than India) the object of adoption is mainly a charitable one seems to be quite correct. For example, in countries such as the United Kingdom the driving motive for adoption appears to spring more from a concern about children. As stated in the recent report of the Departmental Committee on the Adoption of Children, 1970,[76] above all the child is the focal point in adoption; providing homes in the fullest sense for children who need them is its primary purpose.

Extending the range of Legal Provisions for the care of children:

The Departmental Committee on the Adoption of Children (1970) has observed[77] that the existing range of legal provisions for the substitute care of children is incomplete, in that the law provides no generally available means, short of adoption, whereby persons other than natural parents caring for a child may obtain legal recognition and security for their relationship to the child, without cutting his links with his natural family.

Apart from adoption, there are two kinds of legal proceedings under which legal rights in relation to a child may be sought by persons other than the child's parents. These are guardianship and wardship.

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76. At para. 8.
77. At page 33 ff.

As to the meaning of the term 'guardian' Bromley[78] observes that the term 'guardian' is sufficiently wide to include a parent, for parents are regarded at Common Law as the natural guardians of their children. But in sommon parlance the concepts of parents and guardians are quite distinct, for the rights and duties of the former arise automatically and naturally on the birth of the child, whilst the latter voluntarily places himself in loco parentis to his ward and his rights and duties flow immediately from this act. As regards Wardship, if an infant is made a Ward of Court, he remains permanently under the care and control of the Court. Although a guardian will be appointed, he is more in the nature of an agent or officer of the Court; he will be responsible for the day to day supervision of the ward, but he must refer all major decisions, for example, those relating to custody, education or marriage to the Court[78]. A guardian must also be distinguished from a foster parent, who has de facto control and custody of a child without being its legal guardian.[78] So long as no one else claims the custody of the child, the person who actually has it will be entitled to retain it; if this is disputed, the court must be guided by the child's welfare in determining in whose favour to make the order.[79]

A person who has no established parental or legal relationship to a child cannot apply for appointment as the child's guardian unless

(i) the child has no parent, no guardian and no person having parental rights with respect to him or (ii) the Court exercises

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78. For a further discussion refer P.M. Bromley's Family Law, Third edition (1966) pages 369 to 386.

79. Guardianship of Infants Act, 1925, S.I.

its power to appoint, in certain circumstances, a guardian to act jointly with a surviving parent; it is only in these comparatively rare situations that relatives or foster parents caring for a child can apply for guardianship (See Adoption Committee 1970's Report referred to above).

In certain situations though adoption remains available in law, guardianship would seem more appropriate both for relatives and for foster parents. Among such situations are the following mentioned by the Departmental Committee: where the chief motive of the applicants is to have security of care and legal status as the guardian of the child; where the natural parent wants to keep in touch and this is desirable; where there is an element of risk that the applicants may not be able indefinitely to continue as parents, e.g. because they are elderly or may not continue in good health; where there is a good chance that natural parents may eventually wish to be able to resume care of the child. There would however be no reason why guardians should not at a later date be able to apply for an adoption order if otherwise eligible. If a person fosters a child and pays for its education and food he would be justified in expecting better protection from the law and greater rights than he enjoys at present, although the paramount consideration should no doubt be the welfare of the child. As such the Departmental Committee on the Adoption of Children (1970) considers that guardianship should be made available by statute to foster parents and to relatives who are already caring for a child so as to safeguard their position. This provision appears to be a very wholesome one both from the point of view of the child's welfare (who is likely to be looked after much better than in his natural home) and also from the point of view of the foster parents who deserve legal recognition and

better protection from the law for all the care and trouble they take and the sacrifice they make in the interests of child and human welfare. In order to cut out wholly unjustified or frivolous applications, the requirements in regard to care and possession and in the case of foster parents, obtaining local authority permission would be the same as for adoption. The Committee suggests[77] that irrespective of whether the child's natural parents consent to guardianship: (a) foster parents should not be able to apply for guardianship until they have cared for their foster child for at least a year, and should have an unfettered right to apply to the Court if they have cared for the child for 5 years or more (para 108) (b) foster parents who have cared for a child for at least one year but less than 5 years should be able to apply for guardianship only if the local authority consent (para 108) (c) Relatives and Foster parents who have cared for a child for more than 5 years, should be required to notify the local authority of their intention to apply for guardianship, and an order should not be made until at least 3 months have elapsed from the date of the notification (paras 108 and 109). Also the child's parents and others interested should be made a party to guardianship applications with a right to be heard before the Court takes a decision (paras 110 and 111). The welfare of the child should be the first and paramount consideration in exercise of its powers by the Court in respect of guardianship applications.

Since a guardianship order can be reviewed by the Court at any time; the Committee therefore felt that there would be no need of formal provisions for the giving of parental consent. This proposition appears to be a fair and reasonable one. While it is true that the best interests of a child are normally secured in his natural home, there are innumerable instances of

unscrupulous parents not caring for their own children. In such cases it would be justified for a Court to appoint a guardian of the child if in the opinion of the Court, the child's welfare so demands it. Also, as the guardianship order does not make the ward a child of the guardian and can be reviewed at any time by the Court, it would be justified to dispense with parental consent which may not normally be forthcoming from unscrupulous parents for reasons other than the welfare of the child.

The Committee felt that adoption should be retained as an alternative to guardianship for legitimate children. The Committee considers that if adoption is retained Guardianship should be accepted as the normal procedure and that adoption orders should be granted only in exceptional circumstances, where the Court is satisfied that it would be in the child's interests. A particular onus would rest with the local authority in their investigation of all the circumstances and on the Court in its final decision as to whether or not to grant an adoption order. This seems an excellent recommendation. Thus, adoption should be resorted to only after mature deliberation and full considerations of the pros and cons, and that suitable alternatives, as suggested by the Committee should be made available to persons who fulfil the requirements laid down by the Committee.

The Committee also felt that legitimate and illegitimate children should be treated similarly in law. Few would disagree with the Committee's proposition that legitimate and illegitimate children should be treated similarly in law. It may be pointed out here that the Hindu law recognises the relationship of an illegitimate child to his father and family and also gives him

substantial rights[80] and it seems unreasonable that an illegitimate child should be deprived of rights which he would otherwise have obtained, for no fault of his.

The Committe is also of the view that allowances should be available in guardianship cases and that there might be a case for introducing subsidised adoption. By this means it is envisaged that more adoption homes might be found for such children (handicapped, mixed race, older children, families of children) if financial help were available, for instance with people who already have children and feel unable to assume an extra financial burden. Although this seems to be a laudable proposition, it is however suggested that in such cases extra precaustions and checks should be introduced and the Court should satisfy itself absolutely that such subsidized adoptions and guardianships are for the welfare of the child, for in such cases there is always present the danger of unscrupulous persons wishing to take over the extra responsibilities possibly lured by the additional income which may come their way by this means. Hence in case of 'subsidised adoption' a thorough system of checks and controls should be put in vogue.

The Departmental Committee on the Adoption of Children 1970, has also proposed that the long-term welfare of the child should be the paramount consideration in resolving conflicts over adoptions. Much is made of parental consent

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80. See the discussion at p. 92 ff. Also see Derrett: Introduction to Modern Hindu Law (1963), Paras 32-39, 407, 410, 526, 670, 757, 842 and 844. Also see Derrett's Article : Five doubtful cases in Hindu Law from Madras - III - Inheritance by or from Illegitimates; 1963 1 M. L. J., J, 1, 13 ff.

both in the report on adoption in relation to guardianship and to adoption[81]. In an instructive article entitled 'Parental Consent to Adoption',[82] Ian Saunders has reviewed the case law on the point which would be useful to summarize here.

S.5. of the Adoption Act, 1958 lays down that a court may dispense with a parent's consent if he "is withholding his consent unreasonably." But as to what constitutes withholding consent unreasonably there has been considerable conflict of opinion. In Hitchcock v. W.B.[83] Lord Goddard L.C.J. observed that "the mere fact that the adoption order will be for the benefit of the child does not answer the question whether consent is being unreasonably withheld". So also in Re K.[84], Jenkins L.J. giving the judgement of the Court said: "Prima facie it would seem eminently reasonable for any parent to withhold his or her consent to an order thus completely and irrevocably destroying the parental relationship. One can imagine cases short of such misconduct or dereliction of duty as is mentioned in S.3(1)(a) [a parent abandoning, neglecting or persistently ill-treating the child] in which a parent's withholding of consent to an adoption might properly be held to be unreasonable, but such cases must, in our view, be exceptional." From these two cases two principles were established, i.e.; that the Court was primarily to concern itself with the attitude of the parent, the child's welfare being a subordinate matter in deciding whether the parent was

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81. See also S.5. of the Adoption Act, 1958.
82. The New Law Journal, July, 15th, 1971, pp. 608 to 610.
83. [1952] 2 Q.B. 561.
84. [1953] 1 Q.B. 117.

ureasonably withholding consent and secondly it was prima facie reasonable to refuse consent.

However, in a later case in Re. L[85] Lord Denning stressed that in deciding whether or not a parent was acting unreasonably, the child's welfare was a very important factor, for "a reasonable mother surely gives great weight to what is better for the child." And in Re C(L)[86] Diplock L.J. propounded the following two irreconcilable tests (see Re B[88] below) viz., "Would a reasonable parent regard a refusal to permit the adoption of his child as involving a serious risk of affecting the whole future happiness of the child?" Later he suggested the test "Does the withholding of the consent by the parent show a callous or self-indulgent indifference to the welfare of the child?"

Next we have two conflicting decisions of the Court of Appeal in 1970 in Re W[87] and Re B.[88] respectively. In Re W.[87] the majority view of the Court of Appeal was that parental consent could only be dispensed with if there had been misconduct on the part of the parent. In the view of Sachs L.J. the parent should be guilty of conduct culpable to quite a high degree and in Cross L.J's opinion to dispense with parental consent, the conduct on the part of the parent must be such as to amount to the shutting of his eyes to a blameworthy degree to the obvious dangers to which he was exposing the child.

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85. (1962) 106 Sol. JO. 611.
86. (1965) 2 Q.B. 449.
87. [1970] 3 All. E.R. 990.
88. [1970] 3 All. E.R. 1008.

However, in Re B[88] a differently constituted Court of Appeal repudiated the view that culpable conduct by the parent was a necessary pre-condition to the Court's dispensing with consent and stressed that the test should be one of reasonableness Their Lordships approved the first of the two tests formulated by Diplock L.J. in Re C.(L)[86] (see above) and rejected the second.

In the face of these conflicting opinions a decision by the House of Lords became essential and in an appeal from the Court of Appeal in Re W.[89], the House of Lords laid down their interpretation of the law as to when refusal of consent to adoption by a parent was reasonable. The following were briefly the facts of the case. The mother, W, had two children by X. She later had a third child by Y. When the child was one week old, in April, 1968, he was placed with the applicants, a married couple who were registered foster parents. In January, 1969, the applicant sought an adoption order in respect of the boy. On February 11, 1969, W. Consented to an order being made; but withdrew her consent in March, 1969. At the time of the hearing neither X nor Y, lived with W, and there was no prospect of either doing so in the future. W was living with a female cousin and her two older children, relying on her cousin and public assistance for support. The County Court judge decided to dispense with W's consent on the ground it was being withheld unreasonably. The decision was reversed by the Court of Appeal for two reasons: first that the judge had erred in law by basing his decision entirely on the assessment of the best interests of the child; secondly, if the judge had applied the correct test, he could not, in the opinion of the

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89. (1971) 2 All. ER. 49.

Court of Appeal, have held that the mother was acting unreasonably.

As stated above, the correct test was that culpable conduct by the parent was necessary to establish that the parent had acted unreasonably in withholding consent.

The House of Lords. however, restored the decision of the judge at first instance and rejected the view that the judge decided the issue solely by reference to the child's welfare. In essence their Lordships returned to the view expressed by Lord Denning in Re.L.[85] when he said "In considering the matter I quite agree that (i) the question whether she is unreasonably withholding her consent is to be judged at the date of the hearing; and (ii) the welfare of the child is not the sole consideration; and (iii) the one question is whether she is unreasonably withholding her consent. But I must say that in considering whether she is reasonable or unreasonable we must take into account the welfare of the child. A reasonable mother surely gives great weight to what is better for the child. Her anguish of mind is quite understandable. But still it may be unreasonable for her to withhold consent . We must look and see whether it is reasonable or unreasonable according to what a reasonable woman in her place would do in all the circumstances of the case." This statement of law was approved by all five Law Lords. The decision makes it clear that culpable conduct by a parent is not a necessary pre-requisite to dispensing with consent. Although welfare of the child is not to be the sole test the judgements seem to make it clear, that in any case where the welfare of the child clearly requires that he stay with the adopters, a parent

withholding consent will be considered to be acting unreasonably. As observed by Lord Hailsham L.C. "Although welfare per se is not the test, the fact that a reasonable parent does pay regard to the welfare of the child must enter into the question of reasonableness as a relevant factor. It is relevant in all cases if and to the extent that a reasonable parent would take it into account. It is decisive in those cases where a reasonable parent must so regard it."

Ian Saunders poses the question whether we should go further and ensure that the child's welfare is not just "an important factor" but, using the terminology of the Guardianship of Infants Act the "first and paramount consideration*, and suggests that such a step would do much to improve the law. He, further suggests that the basic provision requiring parental consent should be retained while continuing to allow the Court to dispense with this consent in certain circumstances, including those where a parent is deemed to be "withholding his consent unreasonably". Also that in deciding whether or not a parent is acting unreasonably, the first and paramount consideration should be the child's welfare. Such a provision, opines Saunders, would provide some safeguard for the parents' interests while recognising that the Court's chief consideration must be for the welfare of the subject of the order, the child.

In this connection it will be instructive to compare the corresponding Smriti law on the subject. The following text of Vasistha seems to stress that consent is essential. "Man formed of uterine blood and virile seed proceeds from his mother and his father (as an effect) from its cause. (Therefore) the father and the mother have power to give, to sell, and to abandon their (sons)."[90] Manu prescribes adoption

90. For rules on adoption see Vasis XVII, 26, 28-30, 39, XV, 1-10. See also J.C. Ghose: Hindu Law (2nd edn.) p.638. of Kapur's Hindu Law of Adoption (1933) p.643.

in times of distress.[91] The term 'distress' has however not been defined. The 'distress' may, therefore, either be of the natural parents not being in a position to support the child or it could possibly also refer to the child being in distress i.e. when the welfare of the child so demands it; in which case this view may well correspond closely to the statement of law laid down by Lord Hailsham L.C. (above). Reference may also be made here to the story of adoption of Śunaḥsepa by Viśvāmitra as an instance in which the Vedic Rishis regarded the adoption as valid from the child's welfare point of view even though the natural father was not quite willing to part with his son.[92]

However, there appears to be a difference in the status of a child in English and Hindu law as regards adoption. The welfare of the child seems to be the primary or a very important concern of the law in England.[93] In Hindu law it seems that the adopting parents interest predominates. It thus follows that a contrast can be made between adoption in a sophisticated industrial society with a common law basis and a society based on religious laws despite the influence of the common law.

Furthermore, if (as I take it as normal) parents have children for their own (the parents') sake, the English law still seems to accept the strength of the natural tie. Similar is the position in Hindu law in this respect. Anyway, the study of the adoption law of a society conditioned by religion (as is the Hindu) might surely indicate some limits

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91. See page 11 of the thesis.
92. Refer to page 579 of this thesis.
93. See Section 5 of the Adoption Act 1958 and the cases referred to in the above article.

to the suggested move to make the child's welfare paramount.[94] For example, carried to its natural conclusion, were this principle accepted, any child born to parents of whom society does not approve could be placed in adoption!! This might be right but psychologically what would the result be? I suggest that many parents (however bad they are) need children to help them weather the storms of life and to give them purpose. The simpler the society the more marked this need seems to be.

There is a final point of importance. The existence of children whether one's own or not (quite apart from giving the parents or adopting parents an heir) can (not always!) make them more humane, more sensitive and more considerate to others (in sum: better members of society). This may be what is aimed at in Hindu law today in adoption and in English law. In this respect then both laws are directed at the same psychological end but the emphasis is different in the laws. The reason for this difference is possibly due to the difference in the social patterns of the two countries, i.e., the smallness of one country with a more coherent law and more closely knit values' system as compared with a larger country and a more diffuse society such as the Hindu.

In conclusion I would like to suggest that in the case where parental consent for adoption is not forthcoming but the Court considers that the adoption will be in the interests of the child and as such the non-consent of such parent is unreasonable, the best solution is that in such cases the Court should make guardianship orders in the first instance. As suggested by the Departmental Committee on

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94. Refer to the above cases and suggestions in the above article.

Adoption of Children, 1970 referred to above (with which I agree), guardianship should be accepted as the normal procedure and adoption orders should be granted only in exceptional circumstances where the Court is satisfied that it would be in the child's interests.

CHAPTER II

LEGAL EFFECTS OF ADOPTION ON THE NATURAL FAMILY

(1) "Complete Severance" from Natural family Adoption in the 'Dattaka form' under Hindu Law before 1956

The basic text which lays down the effect of adoption on the natural family of the adopted child is a text of Manu which runs thus "The adopted son is not to take away (with him when he is passing from the family of his birth to that of adoption) the Gotra (= family name) and the Riktha (= wealth) of the progenitor: the Pinda (= oblation offered to deceased ancestors) is follower of the Gotra and the Riktha, the Swadhā (= Pinda) goes away absolutely from the giver".[1]

This text is translated by Sir William Jones, followed by W. MacNaghten and Colebrooke, as follows: "A given son must never claim the family and estate of his natural father. The funeral oblation follows the family and estate; but of him, who has given away his son, the obsequies fail".[2] But this version has been criticised by Golapchandra Sarkar Sastri as misleading, if not inaccurate, implying as it does future and not vested right.[3]

As the Hindu law as to the rights of an adoptee in his natural family is entirely based on this text of Manu, it would be helpful to study the explanations given by the various

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1. Manu IX, 142 (adapted from G.C. Sarkar Sastri: Treatise on Hindu Law, 7th edition 1936 p. 190).
2. Dat. Mim. VI, 6 (vide Kapur: Law of Adoption 1933 p. 397).
3. G.C. Sarkar Sastri: Treatise on Hindu Law, 7th edition 1936 (p. 190).

commentators on this text.

The author of the Dattaka Mīmāṃsā explains thus, "The given son is not to partake of the progenitor's gotra and riktha; likewise of him who gives the son, Swadhā (Śrāddha performed by the given son) goes away absolutely (i.e. ceases)".[4] He then quotes the Smṛiti Chandrikā as follows - The author of the (Smriti) Chandrika (says) - "By this (text of Manu) is declared that by the very act creating filial relation (to the adopter), the given son's proprietary right in the adopter's property and the status of being of the same gotra with him, arise; and on the other hand, through the extinction of the filial relation (to the giver) from the very act of giving (in adoption), the extinction of the given son's proprietary right in the giver's property, and the extinction of the giver's gotra take place".[4]

The Dattaka Chandrikā explains it as follows "By this (text) it is declared that through the extinction of the filial relation (to the giver), from the very act of giving (in adoption) the extinction of the given son's proprietary right in the giver's property, and the extinction of the giver's gotra take place".[5]

The Vyavahāra Mayūkha, explaining this text of Manu says that in the case of a son given away the relationship with the natural family ceases as regards the offering of 'Piṇḍas' and the taking of the natural father's estate after the adoption, but he may inherit and give oblations if he is

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4. Dat. Mim. VI, 6-9 - Translation from G.S. Sastri's Hindu Law 7th Edn. 1936, p. 253 and Sm. C (II. 289).

5. Dat. Chand. ii, 18-19.

a dwy-amushyāyana or a son of two fathers.[6]

Kamalākara, the author of the Nirnayasindhu quoting Kātyāyana and Laugākṣī cited in the Pravaramañjari in support, states that Manu IX, 142 only applies when the natural father has a son or sons (other than the one given away). According to the Dharmasindhu when all the ceremonies including the cūḍā are performed (by the adoptive father) the adopted boy has only the gotra of the adopter but when a boy of another gotra is adopted after the performance of Upanayana in his natural family or when only the Upanayana is performed by the adoptive father, the adopted boy should repeat both gotras at the time of bowing at the feet of elders or in Srāddha and other rites.[7] The Smritis are, however, silent on the point and the story of the adoption of Sunahsepa by the illustrious Vedic sage Visvāmitra[7b] would prove that there was no bar as to age or the performance of ceremonies in natural family for the adoption of a child. Also Manu's text (IX 142) clearly states that the adopted son is to give up the Gotra and Riktha of the progenitor, hence the above view of Dharmasindhu is questionable.

The commentators of Manu's code also hold the view that the adopted son's rights in the natural father's family become extinguished by adoption. And what is predicated with

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6. V. Mayukha IV, v, 5 to 22.

7. Referred to in Kane: History of Dharmasāstra Vol. III (1946) p. 692. Nirn. Sindhu III, p. 389, Dharma Sindhu III, p. 161.

7b. For a brief account of the story of the adoption of Sunahsepha refer to Hindu Law of adoption by G.S. Sastri (1891 edn) p. 181 et seq. It may be noted that as the story goes Sunahsepa had taken a prominent part in a ceremony which could only be done by a person upon whom the Upanayana rites had been performed.

respect to the progenitor applies to other natural relations as well, as the adopted son ceases to be a member of the natural father's gotra or family.

Case Law on the point

In the case of Kali Komul Mozumdar v Uma Sunker Moitra[8] the Privy Council accepted the principle of law laid down by Mitter J. in the full bench case[9] that "an adopted son occupies the same position, and has the same rights and privileges in the family of the adopter as the legitimate son, except in a few specified instances. ... The theory of adoption depends upon the principle of complete severance of the child adopted from the family in which he is born, both in respect to the paternal and maternal line, and his complete substitution into the adopter's family as if he were born in it". This was cited with approval by the Privy Council in the cases of Nagindas v Bachoo[10] and Raghuraj Chandra v Subhadra.[11] In the latter case[11] their Lordships of the Privy Council laid down that according to Hindu law, adoption operated as a rebirth for all purposes material to the question and that the natural brother was not "brother" within the meaning of Section 22 of the Oudh Estates Act. In Chandra Kunwar v Chaudhri Narpat Singh[12] also the Judicial Committee held that an adopted son ceases by virtue of adoption to be regarded as the son of his

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8. 10 I.A. 138 (P.C.).
9. (1881) I.L.R. 6 Cal. 257.
10. (1916) I.L.R. 40 Bom. 270 (P.C.).
11. (1928) I.L.R. 3 Luck. 76, 87 (P.C.).
12. (1907) I.L.R. 29 All. 184, 194 (P.C.).

natural father, and becomes for the purpose of inheritance or succession the son of his adoptive father. His obligation to perform the funeral ceremonies for those of his family for whom he would otherwise have offered oblations ceases and, as observed by Sarkar and J.D. Mayne, he has not even to observe pollution on the birth or death of any member in the family of his birth.[13] The adopted son loses his rights in the coparcenary property,[14] he gives up the natural family and everything connected with it[15] and his natural family cannot inherit from him[16] unless in his new relationship he is still a heritable relation.

The Pepsu High Court has held in Lekh Ram's case that an adoption under the Mitakshara has the effect of transplanting the adopted boy from his natural family into the family of the adoptive father and by such adoption the adoptee acquires the rights and privileges of a natural son in the family of the adopter. He ceases to be a coparcener in the family of his birth from the time of adoption.[16a] In Vasant v Dattoba the Bombay High Court held that as soon as the adoption ceremony is performed and the boy to be adopted is given over by the natural family to the adopting family, the

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13. Sarkar, 'Adoption', 2nd edn., 388; Dat. Mim. VIII, 2-4 Mayne: Hindu Law, 11th edn., 248.

14. Kunwar Lallajee v Ram Dayal (A.I.R. 1936 All. 77.

15. Dattatraya v Govind (1916) I.L.R. 40 Bom. 429.

16. Muthayya Rajagopala Thevar v Minakshi Sundara Nachiar and others (1902) I.L.R. 25 Mad. 394; Raghuraj Chandra v Subhadra (1928) I.L.R. 3 Luck. 76, 87 (P.C.) (natural brother is not "brother" for the purpose of Succession to adopted son's estate in the adoptive family).

16a. A.I.R. 1951 Pepsu 99 (100).

ties between the adopted son and the natural family are severed and fresh ties are created between the adopting family and the adoptee. For all purposes (except as to prohibition against marriage with a girl in the natural family whom he could not have married and as to prohibition against adoption of a boy from his natural family whom he could not have adopted) he becomes as if he was born into the family in which he is adopted.[16b] So also the Punjab High Court held in Deoki Nandan v Rikhi Ram that adoption once completed has the effect of irrevocably transferring the adopted boy from his natural family to the adoptive family and to confer upon the adoptee the same rights and privileges in the family of the adopter as the natural legitimate son, except in certain cases like those relating to marriage, adoption etc., and that it was undoubtedly open to the adopted son to renounce his right of inheritance in the adoptive family, but his status as adopted son could never be renounced by him.[16c] In the case of adoption among Jats of Amritsar District it has been held that the completely adopted son is transplanted into the adoptive family.[16d] In Indar Singh v Kartar Singh,[16e] Dua, J. of the Punjab High Court observed that the theory of adoption under the Hindu Law contemplates a complete severance of the adopted child from the family of his birth, both in respect of his paternal and maternal lines and his complete substitution into the adopter's family as if he were born in it, except in certain limited respects. The

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16b. A.I.R. 1956 Bom. 49 (52).

16c. A.I.R. 1960 Punj. 542 (545).

16d. Teju v Kesar Singh A.I.R. 1954 Punj. 30, 31.

16e. A.I.R. 1966 Punjab 258.

adoption had the effect of transferring the adoptee from his natural family into that of his adopter conferring on him thereby the same rights and privileges in the adopter's family as a legitimate son except in matters of marriage, adoption and 'perhaps in regard to the share on partition between the adopted and after born son'. The adoptee loses all the rights of a son in his natural family. Broadly put, adoption under the Hindu law is the admissibility of a stranger by birth to the privileges of a child by a legally recognised form of affiliation and in contemplation of Hindu Law, an adopted child is deemed to be begotten by the father who adopts him or for and on behalf of whom he is adopted. Thus 'taking of a son' is a substitute for failure of male issue and its object is two-fold (i) to secure the performance of the funeral rights of the person to whom adoption is made and (ii) to preserve the continuance of his lineage. His Lordship held that the right of pre-emption conferred by Section 15(1)(a) of the Punjab Pre-emption Act on the father's brother or father's brother's son of the vendor is available even if the relationship is created by adoption or appointment of an heir. In view of Sections 2(54) and 2(18) of the Punjab General Clauses Act and 3(20) and (57) of the General Clauses Act, the words "father" and "son" in the Punjab Pre-emption Act include the adoptive father and adoptive son. The position appears to have been made clearer still, observed His Lordship, by Section 12 of the Hindu Adoptions and Maintenance Act which lays down that an adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth

shall be deemed to be severed and replaced by those created by the adoption in the adoptive family.

Rights of the pre-adoption sons of adoptee in natural family.

The natural father loses all power over the son from the moment he is adopted.[17] Where the adopted son left a son of his own in the natural family it has been held that he was entitled to give that son in adoption. But as suggested by Derrett[17a] the better view seems to be that the substitution of families is so complete that he can neither give such son in adoption[17b] nor affect the status of that son when he himself separates.[17c]

In Babarao v Baburao, the Nagpur High Court held that a Hindu, on his birth acquires an interest in the joint family property of his grandfather and this right is not extinguished when his natural father is adopted by the latter's uncle as his son. The natural father's personal status as his father's son is completely destroyed, but that does not affect the status of his pre-adoption son. His pre-adoption son continues to be the grandson of his grandfather and his right to a partition in that branch is not in any way affected. The fact that the adoption of the natural father was in the same coparcenary makes no difference to the applicability of the aforesaid

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17. Krishnamurthi Ayyar v Krishnamurthi Ayyar & another (1927) 50 I.L.R. Mad. 508.

17a. Derrett: Modern Hindu Law (1963 edn.) 173.

17b. Sharadchandra v Shantabai, A.I.R. 1944 Nag. 266; [1944] Nag. 544 (F-B).

17c. Babarao v Baburao A.I.R. 1956 Nag. 98; [1955] Nag. 903.

principle, and consequently the grandson's right to claim a partition in the branch of his grandfather cannot be negatived.[17c]

So also where an unmarried, divorced or widowed woman adopts a child, the adoptive mother, or failing her, other relations in the adoptive family would be guardians in marriage of the child and not the natural father (Section 12 of the Hindu Adoption and Maintenance Act) as rightly pointed out by Derrett.[17d] The guardianship rights of the natural parents cease with the adoption for all purposes, although they may be preferred to be appointed as guardians where the adoptive parent is temporarily incapable of acting as guardian. The connection of the adopted son with relations in his natural family becomes extinguished unless they he also his relations by adoption through the adoptive father and in this way mutual rights of inheritance might still exist.

In Lekh Ram's case the Pepsu High Court held that the transplantation is restricted and confined to the adoptee and his wife and does not extend to his sons born before he was taken in adoption. Such sons do not acquire the status of coparceners in the family in which their father was adopted and they do not acquire the gotra and right of inheritance in the family in which their father has been adopted.[17e] In Nesa v Kumbha, a case of Jats in the former State of Bikaner, the Rajasthan High Court held that where a married person is given in adoption and such person has a son at the date of adoption, the son does not, like his father, lose the gotra and right of inheritance in the family of his birth, and does not acquire

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17d. See Derrett: Modern Hindu Law (1963 edn.) § 172.

17e. A.I.R. 1951 Pepsu 99 (100).

the gotra and right of inheritance in the family into which his father is adopted. This rule of Hindu law applies in the case of Jats in the former state of Bikaner. A custom derogating from such law, according to which when a father is adopted, his sons who had been born before the adoption also went along with the father into the adoptive family, had not been proved to prevail among the Jats in the Area.[17f]

Prohibitions for marriage in Natural family

On the question as to whether the adopted son would be free to marry a girl within the prohibited relationship in the natural family, some modern authors like Mayne and others maintain, on the authority of the commentaries on adoption, that the tie of blood with its attendant disabilities is never extinguished and therefore, he cannot, after adoption marry anyone whom he could not have married before adoption.[18] In Madhavrao v Raghavendrarao,[19] Kania (C.J.), and Gajendragadkar, J.,[20] of the Bombay High Court held that on the basis of custom a Hindu may marry a girl belonging to his natural father's gotra after she is adopted into a different gotra. The salient points of this case are briefly discussed below.

The first defendant in this case belonged to the 'Bharadwāja gotra' and having lost his first wife, married

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17f. A.I.R. 1958 Raj. 186 (187, 188).

18. Mayne's: Hindu Law; Eleventh Edition p. 248 where he refers to Dat. Mim. VI, 10; Dat-Chand, IV, 8; V. May, IV, 5. S. 30; Mootia v Uppon (1858) Mad. S.D.A. 117.

19. A.I.R. (1946) 33 Bom. 377.

20. Both these judges later became Chief Justices of the Supreme Court of India.

another woman originally belonging to the same gotra as his own. This latter woman had however been taken in adoption by one 'K' who was of a different gotra a day before her marriage to the first defendant. The following points arose for decision: (i) whether the prohibition against Sagotra marriages is absolute or only recommendatory under Hindu law (ii) whether a daughter can be validly adopted into a different family under Hindu law (iii) whether the prohibition as regards Sagotra marriage applies in both natural and adoptive families and (iv) whether by a custom applicable to the Deccani Brahmins, to which community the parties in the suit belonged, such marriages were recognised as valid.

On the first point the following remarks of Kane in his 'History of Dharmasastra'[21] are instructive: "It is a canon of the Pūrvamīmāṃsā that if there is a seen (dṛṣṭa) or easily perceptible reason for a rule stated in the sacred texts, it is only recommendatory and a breach of such rule, does not nullify the principal act. But if there is an unseen (adṛṣṭa) reason for a rule and there is a breach of such rule, the principal act itself is rendered invalid and nugatory thereby. The rule about not marrying a woman who is diseased or who has superfluous or deficient limbs has a seen reason viz., marriage with such a girl causes unhappiness (if she is diseased) or comment (if she has deficient limbs). Therefore, if a person marries such a girl the marriage is perfectly valid. But there is no seen or easily perceptible reason for the prohibition against marrying a sagotra or sapravara girl. Therefore, such rules go to the root of the matter and are obligatory and,

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21. Vol. 2, i, p. 437.

if there is a breach of them, the marriage is no marriage, it is null and void".

Construing Manu, Medhātithi[22] lays down that if one happens to marry a girl belonging to the same gotra as himself, the marriage though performed would be as good as not performed; and this for the simple reason that the character of the marriage is determined by scriptural injunction. The Mitākshara construing Yajnavalkya comes to the same conclusion.[23]

Gajendragadkar J. rejected the argument regarding the principle of Adṛṣṭa, stating that 'Vijnaneswara's interpretation is based on the Mīmāṁsā rules of Interpretation' and that 'the rule is artificial' and that he 'would not be prepared to adopt it as a safe guide in interpreting sanskrit texts". Nataraja Ayyar in his Mīmāṁsā Jurisprudence[24] describes this as a really serious charge against the Adṛṣṭa principle of the Mimamsa Sastra and quotes the following passage from Sir P.S. Sivaswamy Ayyar's[25] to elucidate the Adṛṣṭa principle. "Hindu lawyers and philosophers did not consider it wise to base any system of rules of conduct whether legal, social or ethical upon a purely rationalistic foundation or upon the commands of human authority. The authority of Revelation alone could furnish the bedrock upon which a

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22. Medhātithi on Manu; III, 11. Manu Smriti (with the Bhāsya of Medhātithi) translated by G. Jha, Vol. II, Pt. I, (1921) p. 23 et. seq.

23. Mitākshara iii, 52 to 54.

24. Ganganatha Jha Research Institute Series No. 2, 1952, p. 13.

25. Sir P.S. Sivaswamy Ayyar's foreword to Sankara Rama Sastry, Fictions in the development of Hindu Law Texts, Madras, 1926

suitable system of law and order could be founded".

> "The raison d'être and function of Sruti according to the Hindu Theologians is to impart knowledge which could not be obtained from other sources or to prescribe acts which would not be performed by the mere prompting of natural inclination. Otherwise the Vedas would be superfluous. No revelation, inspiration or supra-mundane authority is required to tell us things which can be learnt by the light of nature alone ... where the Smritis enjoin the performance of particular acts for which no justification in the mere light of nature can be found, the rules are held to be valid and for this reason. To discard the injunction as not binding on the ground that no earthly reason can be found for it would be a total repudiation of the validity of the scriptures. No principle of interpretation could be accepted as valid which would have the effect of abrogating the rule. The maxims of interpretation applied by the Mimamsaka show a very high legal acumen and differ but little from the maxims of modern lawyers in the interpretation of Statutes";[26]

and again

> "Dharma has been defined by the Mimamsaka as 'the means of attaining welfare or happiness where the connection between the act or omission and the consequent welfare or happiness is mysterious and not ascertainable'. An act may constitute Dharma in the popular sense, but it is not Dharma according to the Mimamsaka unless the connection between the act or omission and the resulting good is mysterious i.e. can be established only by the intervention of what is called Adṛṣṭa or Apurva - the existance of the link being vouchsafed only by the Śruti".

That there could be little doubt that the prohibition of Sagotra marriages was meant to be absolute and mandatory by the Smriti writers could be seen from Baudhāyana's[27] declaration that a Sagotra wife should be abandoned as far as sexual life is concerned and that a man who has intercourse

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26. Sir P.S. Sivaswamy Ayyar's lectures on 'The Evolution of Hindu Moral Ideals', Kamala Lectures, 1935, Calcutta University.
27. Baudhāyana's Pravarādhyāya, 54.

with a Sagotra girl should undergo theChandrāyana penance. After that he should not abandon the woman, but should only maintain her as if she were a mother or sister, if a child is born it does not incur sin and it should take the gotra of Kasyapa. The views of Sumantu and Gautama on this subject were extremely strong.[28]

The Courts in India have also upheld the restrictions as to sagotra marriages under Hindu Law among the three higher castes[29] and even in the present case Gajendragadkan J. held such marriages invalid for the following reason:

> "However, as I have already pointed out, the Privy Council have consistently taken the view that under the Mitakshara school of Hindu Law the gloss of Vijnanesvara must be accepted as authoritative and binding. That being so, there is no alternative but to hold that marriages between Sagotra persons like defendants 1 and 2 are invalid under Hindu law".

There hardly seems to be any doubt that under Smriti law Sagotra marriages are invalid.

The second point relevant to this case is whether a daughter could be validly adopted under Hindu law. From the above discussion it is clear that Sagotra marriages are invalid under Hindu law. Gajendragodkar J., however, further adds 'This finding, however, does not affect the decision in the case, since I have already held that the custom under which such marriages are permitted and on which the defendants relied has been proved'. In other words this amounts to holding that adoption of daughters is valid in the Bombay School on the

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28. Aparārka p. 80.

29. Ramchandra v Gopal (1908) 32 I.L.R. Bom. 619, 627; Minakshi v Ramanadha (1888) 11 I.L.R. Mad. 49, 51 F.B; Santappayya v Rangappayya (1895) 18 I.L.R. Mad. 397.

ground of custom. But according to the Vyavahāra-Mayūkha,[30] (the chief authority in the Bombay School), which relies on the analogy of Upanayana (that only a male undergoes) and from the use of the pronoun 'he' used in Manu's text 'He (Sah) is called a son given' concludes that only a male could be adopted. In Thakoor Jeebnath Sing v. The Court of Wards, the Privy Council held that the adoption of a daughter was a custom of Hindu law which if not obsolete, as appears to be the opinion of text-writers, is one which in modern times does not seem to have been brought under the consideration of Courts, and their Lordships therefore held that assuming the custom to exist, in as much asit breaks in upon the general rules of succession, it must be strictly proved.[31] In Gangabai v. Anant[32] the adoption of a daughter by a Brahmin of Poona was held invalid according to law and not sanctioned by custom. It was also settled that the adoption of a daughter was invalid under the Hindu law.[33] In Gangabai's case[32] the Plaintiff sued, as the adopted daughter and heiress of one R. of Poona to recover possession of his property. The defendants were sons of R's step-brother. They disputed the Plaintiff's title on the ground that her adoption was invalid under Hindu law and

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30. Vyavahāra Mayūkha, V. 6, 7 quoted by Kane in his history of Dharmasastra Vol. III (1946) p. 674.

31. (1875) 2 I.A. 163; 23 W.R. 409.

32. (1889) I.L.R. 13 Bom. 690 where the Vyavahāra Mayūkha is expressly referred to and followed in preference to Dattaka Mīmaṁsā and Saṁskarakaustubha

33. In re Munshi Ram (1931 I.L.R. 12 Lah. 658, 660, 661; Ram Piari v. Diwan Shiv Ram A.I.R. 1934 Lah., 659 (2).

usage. The subordinate judge held on the authority of the Dattaka Mīmāṁsā and Sanskāra Kaustubha that, according to the Hindu law a daughter could be adopted. He also found that the custom of adopting daughters was prevalant in the district where the parties resided. He therefore passed a decree in the Plaintiff's favour. On appeal the Assistant judge reversed the decree. He held that adoption of a daughter was invalid under the Hindu law and that there was no local usage sanctioning such an adoption. Against this decision the Plaintiff preferred a second appeal to the High Court.

Parsons J. observed:

> "The point which arises in this case is one which appears to have come before the Courts now for the first time. It relates to the validity of an adoption of a daughter by a Brahmin, to place that daughter in the same legal position that his own natural daughter would have held. The Plaintiff claims by virtue of the adoption to be entitled to the e estate of the person who adopted her and to exclude the defendants, who are that persons next of kin from the inheritance. The Dattaka Mimamsa S. 7 and the Sanskara Kaustubha are quoted to us as authorities in favour of the legality of the adoption. We do not however consider that they establish the propositions for which they are cited. The adoption of a daughter appears opposed to the very purpose and history of adoption. "Males only need sons to relieve them from the debt due to ancestors". Colebrook's Dig. Bk. V.T. 273. The adoption of a daughter is not warranted by any Smriti, it is supported by only by some Puranic instances. No instances, however, is cited to us in which the estate passed to the adopted daughter to the exclusion of other male relations. Jagannath denies altogether that a daughter can be adopted. A male only, he says, can become adopted -Vyavahāra MayūkhaCh.IV, S. V, para. 1. We think that this latter authority is of great weight and we follow it".

With regard to this decision it may be pointed out that in the first instance it conflicts with the view of the Privy Council in Gurulingaswami v Ramalakshmamma to the

effect that the authority of the Dattaka Mīmāmsā is not open to examination, explanation, criticism or rejection like any scientific treatise on European jurisprudence. Such treatment would not allow for the effect, which long acceptance of written opinions has upon social customs and it would probably disturb recognised law and settled arrangements.[33a] The Dattaka Mīmāmsā has positively laid down that a daughter can be validly adopted and the fact that such adoptions are rare or scarcely ever come up for dispute before a court of law cannot be the basis for invalidating such adoption. As to Parsons J.'s remarks that the adoption of a daughter is not warranted by any smṛiti, although the Smṛitis are silent on the point but the glaring examples of adoption of daughters given in the Puranas and discussed below are sufficient to tilt the balance in favour of the validity of adoption of a daughter. It is also not true that adoption of a daughter does not serve any beneficial purpose. As shown ~~by me~~ in the discussion which follows the adoption of daughters confers a doubly spiritual benefit. I am therefore unable to agree with the decision of Parsons J. in this case.

Kane in his History of Dharmasastra[33b] mentions the different views on this subject without adding any comment of his own. He refers to the view of the Vyavahāramayūkha[33c] which relying on the analogy of Upanayam (that only a male undergoes) states that only a male must be adopted which view has been

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33a. (1898) I.L.R. 22 Mad. 398, 412; (1898) L.R. 26 I.A. 113, 131.

33b. Vol. III, pages 674-675.

33c. Kane: History of Dharmasastra Vol. III, p. 674 referring to V.M. pp. 108-109.

followed in Gangabai v. Anant[32] and in re Munshiram.[33] Next he refers to D.M. (pp. 112-116); Sam K. (p. 188) and Dharmasindhu[33d] which relying upon such instances as that of Śāntā, the daughter of King Daśaratha (who was adopted by King Lompada) and of Pṛtha, who was the daughter of Sūra and was adopted by Kuntibhoja, say that even a girl may be adopted. Kane also refers to Pannalal who in his 'Kumaun local customs' states that a girl may be adopted as a daughter in Kumaun by custom. In Goa although the Dharmasindhu which sanctions adoption of daughter[33d] is accepted as the leading work but Art. 10 of the Decreto of the 16 Dec. 1880 provides only for the adoption of males. The leading authority on Luso-Hindu law, namely Luis da Cunha Goncalves, Direito Hindu e Mahometano (Coimbra, 1923), discusses the matter at pp. 231 ff. In his view adoption of girls would have no secualr effect in Portuguese territories. He goes on to show how, under the Decreto Art; 12, a son adopted with the consent of the husband (given in writing and registered) will have all the rights as if he were a legitimate posthumous son; but if the widow adopts without such authorisation her son will be able to inheret only from her and her kindred.

The above discussion is merely to show the incongruity in the judgment in the present case where adoption of a daughter for purposes of marriage is held to be valid while in the other cases referred to above the adoption of a daughter has been held to be invalid.

The only solution for their Lordships to justify

33d. Kane: History of Dharmasastra Vol.I, p. 449 n. 1119. Kashinatha's: Dharmasindhu (C.1790) III, 1.9; Nirnayasagar ed. 1936 p. 138. See also Derrett: A critique of Modern Hindu Law (Bombay Tripathi 1970) Paras 160 & 161.

their judgment would have been to clearly hold the adoption of a daughter as valid under the Smṛiti law. Iam inclined to hold the view that adoption of a daughter is valid under the Smriti law. The whole of Sec. vii of Nanda-Pandita's Dattaka Mimāṁsā deals with the different substitutes for the legitimate daughter. Excellent authority is given in it for the daughter 'given' and the daughter 'purchased' etc. Its opening verses show that the progeny which men desire and need is either male or female, and that he who is doomed to fall to a region of horror by reason of his not having produced issue, is he who has produced neither sons nor daughters. The term 'Apatya' i.e., "that through which man obtains exemption from falling into hell", applies to the two sexes'. Sec. vii of the Dattaka-Mimāṁsā seems to be intended to show that a daughter serves to ' prolong the lineage', and save from torments, equally with a son, and in default of a legitimate daughter, a substitute will serve. The whole section is very remarkable and important and seems not to have been sufficiently considered. Nandapandita in his Dattakā-Mimāṁsā supports his conclusion that 'putra' includes a daughter and that on failure of a daughter, a daughter of another could be adopted, by referring to ancient precedents, such as the adoption of Śāntā the daughter of King Daśaratha (a prominent figure of the Rāmāyana and father of Lord Rama) by King Lomapada and the adoption of Prthā or Kunti (a prominent figure of the Mahabharata and mother of the Pandavas), the daughter of Sūra by Kuntibhoja.[34]

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34. Dat. Mim. VII, 30, 34. Vide Adiparva III, 2-3 (cr. ed. Chap. 104) for the adoption of Prtha or Kunṭi and Ramayana, Balkanda, 9th Chapter for that of Sāntā.

The instances of adoption of daughters and that too among the prominent figures of the Rāmāyaṇa and Mahābhārata mentioned above are by themselves a very strong evidence in favour of the validity of adoption of a daughter in Hindu law. It is not true that adoption of daughters will give no spiritual benefit to anyone. On the other hand Sastric material seems to show that a doubly spiritual benefit could be got by adoption of daughters. In the first place, spiritual merit is achieved by the ceremony of Kanyādānam or gift of the daughter in marriage to a suitable bridegroom and secondly benefit could be derived from her son 'the Putrika-putra' who is capable of conferring a spiritual benefit almost equal to that of the Aurasa son.

Now under Sections 10 and 11 of the Hindu Adoptions and Maintenance Act 1956 either a boy or a girl may be adopted. By these provisions the HAMA has restored the right of a female to be capable of adoption (even though unwittingly), which seemed to be legally incapable of being exercised under the Anglo-Hindu law except in restricted Malabar customs.

Finally the question to be considered is whether when a person is adopted into another family his gotra is completely changed for purposes of marriage. The Dattaka Mīmāṃsā citing the following text of Bṛihat Manu "Sons given, purchased and the rest, retain relationship of Sapiṇḍa to the natural father, as extending to the fifth and seventh degrees, like this, their general family, (which is) also, that of their adopter"; states that consanguineal sapinda relationship continues after adoption.[35] Nīlakaṇṭha in the Vyavahāra-Mayūkha denies the

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35. Dat. Mim. II, 8.

authenticity of the text quoted and seems to hold that sapinda relationship in the case of the dattaka ceases in the natural family (vide Manu IX, 142) and he would be free to marry a girl in his natural father's family and quotes the instance of Arjuna, the son of Kunti, born after she was given in adoption by her father Sura to Kuntibhoja and Subhadrā the daughter of Vasudeva, who was the son of Sura.[36] It may however be pointed out here that Manu in IX, 142 merely refers to the cessation of 'gotra' and 'riktha' in the natural father's family of the adopted son and does not mention cessation of 'Sapinda' relationship in the natural family.

The above interpretation of Manu's text by the Vyavahara Mayukha seems to be erroneous since, extending the argument to its logical conclusion it would mean that the adopted son would be free to marry, after adoption, his own natural sister, which conclusion is obviously absurd.[36a] The only instance quoted by the Vyavabara Mayukha viz., of the marriage of Arjuna and Subhadra could well be an instance of a special custom amongst the Kshatriyas of marrying one's maternal uncle's daughter under special circumstances.

The text of Manu that by adoption the child loses the gotra of the natural father could be logically explained, for, after a couple of generations, his affiliation with the adoptive family would be so complete that his original gotra would be completely forgotten and in course of time, for all practical purposes only the adopter's gotra would stand.

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36. Vyav. May. IV, V, 21-35.

36a. For a similar view expressed by Derrett see Adoption in Hindu law by J.D.M. Derrett, Z. vergl. R. 60, p. 79.

However, Kane[37] refers to certain families who possess two gotras i.e., are 'dvigotras' and says that 'In the case of the adopted son also, both gotras and pravaras of both gotras have to be considered and the dictum of Manu (IX. 142) that 'the sons given does not share the gotra and inheritance of the genitive father and the Svadhā (Srāddhas etc.) of the giver ceases', is restriced only to matters of inheritance, Sraddha and the like and does not apply to marriage". On a plain interpretation of Manu's text, which clearly states that the adopted son gives up the gotra etc. of the natural father, it seems doubtful whether the above interpretation put on it by Kane is correct.

The present case (including the final decision of the judges in the case) hinges around customary law as recognised by the modern Courts of law in India. In the light of the rules enunciated by the Privy Council and the Courts, it was held that the custom under which 'Sagotra' marriages were permitted and on which the defendants relied had been proved. However, as I have shown in the discussion at pages 31 to 35 above, a perusal of the rules for proof of custom would show that in many instances they contradict each other.

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37. History of Dharmasastra: P.V. Kane 2; i, pp. 492-493. In his article entitled: After-effects of Adoption (1963) 2 An. W.R., J. 16; Mr. K.V.V.L. Narasimhachary is of the view that the gotra of the natural father enures for the purpose of marriage in the case of the adoptee, but as discussed above this view does not seem to be correct.

From the above discussion, the following salient points emerge:

(a). Under the Smriti law Sagotra marriages are invalid.

(b) A daughter may be validly adopted under the Hindu system.

(c) The Mīmāṁsaka rule that custom should not infringe the Smṛiti injunction is a wholesome rule and should be adhered to as far as possible.

(d) On the question whether when a person is adopted into another family, his gotra is completely changed for purposes of marriage etc., the Smritis seem to be silent. There are conflicting interpretations of Manu's text as to whether the dattaka loses the gotra of his natural father and assumes that of his adopter especially for purposes of marriage etc. Further Manu and other Smṛiti writers allow adoption only in cases of genuine distress and not to be used as a device to evade the law regarding prohibition of Sagotra marriages. Such marriages, it would appear are valid but must be kept within the strictest possible limits.

Is the adoptee divested of property vested in him before adoption

On the question whether the adoptee is divested of the property vested in him before adoption, there has been a difference of opinion between the various courts of India. Whilst the Bombay and the Allahabad High Courts have held that he is divested of such property, the High Courts of Madras, Calcutta, Nagpur and Lahore have maintained the contrary view.

In Ramchandra v Manubai[38] the Bombay High Court laid down the rule that the adopted son should be treated as having been from his birth in the adoptive father's family as such the adopted son cannot acquire a vested interest in the property of his natural father. According to their Lordships of the Bombay High Court the theory that the adopted son lived in the natural family until adoption is untenable having regard to the definite pronouncement of the Privy Council in Nagindas Bhugwandas v Bachoo Hurkissondas[39] wherein a passage from Mitter J.[40] is cited in which it is stated that the theory of adoption involves the principle of complete severance of the child adopted from the family in which he is born, both in respect to paternal and maternal lines and his complete substitution into the adoptive family as if born in it - a statement with which their Lordships of the Privy Council agreed.

However in Manikbai v Gokuldas[41] a dattaka adoption has been held as civil death in the natural family and the

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38. (1919) I.L.R. 43 Bom. 774.

39. (1915) L.R. 43 I.A. 56.

40. Quoted above see note 9.

41. (1925) I.L.R. 49 Bom. 520.

birth of the boy in the adoptive family with all the legal consequences that are incidents of such adoption. It was there held that the right to property in the natural family accrued as if he had been born in it and on adoption he lost all rights to such property. They also observed it quite unnecessary to add the further fiction "as if he had never been born in the family", as the result would be that he would take his own family including his sons born before the adoption with him, but he does not take his sons with him into the adoptive family.[42] If he is to be treated as having civilly died in the natural family, on his adoption the property would pass to the natural heirs of the adopted son and not to heirs of the previous holder. Their Lordships opined that the texts were silent on this question as in olden times, it was thought, adoption of a married man having children would be repugnant to orthodox Hindu customs. Sp also in Dharam Singh v. Bakshi,[43] it was held (obiters) that if any sons of the adoptee were in existence on the date of adoption they would be vested with interest in the property of the natural family and the father's adoption, though it involves his civil death as regards the property does not have the same effect on the rights of his son or sons.

In Raghuraj Chandra v. Subhadra[44] the principle of "a complete severance of the child adopted from the family in which he is born ... and complete substitution into the adoptive

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42. Kalgavda Tavanappa v. Somappa Tamangavda (1909) I.L.R. 33 Bom. 669. The same opinion was also expressed in Bai Kesarba v. Shiv Singhji (1932) 34 Bom. L.R. 1332, 1351.
43. A.I.R. 1926 All. 425. See also Nagayasami v. Kochadai A.I.R. 1969 Mad. 329, which case illustrates the results to which this system could lead.
44. (1928) I.L.R. 3 Luck. 76, 87 (P.C.).

family, as if he were born in it",[39] was re-iterated and the view of the Bombay High Court in Dattatreya Sakharam v. Govind Sambhaji[45] was referred to with approval by the Privy Council. "The fundamental idea is that the boy given in adoption gives up the natural family and everything connected with the family". Their Lordships of the Privy Council further opined that the expressions "civilly dead or as if he had never been born in the family" are not for all purposes correct or logically applicable but are complementary to the term "New birth" - 'as Vasistha's text cited in Mayne's "Hindu Law" para. 107 would show' - he first dies in the family of birth in which his offerings will be no longer efficacious or desired, given by the natural to the adoptive father.

In an earlier case from Madras in Sri Rajah v. Sri Rajah[46] one N. became the sole surviving coparcener of an estate and was later adopted by P. The question in dispute was whether N. continued to be owner of the estate notwithstanding the adoption or whether he was divested of it. The Madras High Court opined that there is great danger in speaking of adoption as civil death and re-birth and in attempting to enforce the logical consequences flowing from these conceptions. After quoting the Dattaka Chandrika to the effect that the initiatory ceremonies already performed by the natural father are not to be 'cancelled' but those yet 'to be completed are to be'performed by the adoptive father, their Lordships remark 'Thus for the

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45. (1916) I.L.R. 40 Bom., 429, 435; see also 'Adoption in Hindu Law' by J.D.M. Derrett, 2 vergl. R. 60 pages 76-78. See also article by Sarkar, R.N.: Adopted son if forfeits estate of natural father, A.I.R. 1948 (J) 49 where the learned author agrees with the view in Dattatreya's case.

46. Sri Rajah Venkata v. Sri Rajah Rangayya (1906) I.L.R. 29 Mad. 437.

purpose of these ceremonies there is no idea of death or re-birth. There is only one continuous existence'. The Madras High Court therefore held that adoption does not divest the adopted son of joint family property of which he had become sole and absolute owner. So also the Calcutta High Court held in Shyama Charan v Sri Charan[47] that under the Bengal school of Hindu law, an heir, who has inherited any property from the family of his birth, is not subsequently divested of it on his being adopted by another person. Their Lordships opined that Raghuraj Chandra v Subhadra[44] must be read keeping in view the oft-cited dictum in Quinn v Leathem[48] wherein the Earl of Halsbury L.C. in the Privy Council said that a case is an authority for what it actually decides and not for what would logically seem to flow from it - for the law is not always logical at all. Further in Moniram Kolita v Keri Kolitani[49] the P.C. had laid down that an estate once vested under Hindu law cannot be divested. Their Lordships referred to the Tagore law lectures[50] wherein it was conceded that the adopted son would take away his own self-acquired property and remarked why should he not take away property to which he is absolutely entitled though acquired by inheritance from his father, for, under the Dayabhaga law nothing but the son's degradation or loss of caste causes extinction of all his property.

However, the Bombay High Court in Dattatraya Sakharam

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47. (1929) I.L.R. 56 Cal. 1135.

48. [1901] A.C. 495 (at p. 506).

49. (1880) I.L.R. 5 Cal. 776.

50. Pp. 389-390. (G. S. Sastri: The Hindu Law of Adoption - Tagore Law Lectures - 1888).

v. Govind[51] had taken the contrary view and held that the property of the natural father vested exclusively in the son before adoption, remains in the natural family, after adoption. For, according to their Lordships the meaning of Manu's verse IX, 142 is clear. The son given in adoption is not to take the'gotra' and 'riktha' (estate) of his natural father. His dissociation from the family (gotra) as well as the estate is insisted upon in unequivocal terms and the words are wide enough to include the estate vested in him at the time of adoption provided it is the estate of his natural father. In the case of self-acquired property it is his own property but in the property vested in him on death of his father it is the property of the natural father. The possible reason why the texts are not explicit enough on the point is that the Smritis did not contemplate only son's being given in adoption. Their Lordships referred to the cases of Behari Lal v. Kailas[52] and Sri Rajah Venkata v. Sri Rajah Rangayya[46] and stated that the former was a decision under the Dayabhaga while in the latter case their Lordships were possibly influenced by Behair Lal's case[52] and also did not consider the texts to be explicit enough to dissent from that view. However, as the texts were in favour of the appellant's contention, their Lordships of the Bombay High Court disagreed with the Madras view.

In a later Bombay case[53] it was held that a person does not, on his adoption, lose the share which he has already obtained on partition from his natural father and brothers in

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51. (1916) I.L.R. 40 Bom. 429, the decision in this case has been sharply criticized by Kane, P.V.: History of Dharmasastra (1946) Vol. III pp. 693-4.
52. (1896) 1 C.W.N. 121.
53. Mahableshwar v. Subramanya (1923) I.L.R. 47 Bom. 542.

his family of birth. For such a son had absolute right to the share and could well have disposed of it as his right was not fettered by a son being born to him and the decision in Dattatreya's case[51] could not be taken as governing the case. Their Lordships commended the views of the Madras High Court in Sri Rajah v Sri Rajah[46] especially that there was nothing in the texts which necessarily carried with it the idea that the adopted son was divested of property which was his own absolutely at the time of adoption and according to their Lordships there was a good foundation for the conclusion arrived at above.

The Nagpur[54] and Lahore[55] High Courts have taken the same view as the Calcutta and Madras High Courts and held that in the case of adoption after partition, the adoptee takes the property vested in him to the family of his adoption.[56] The Allahabad High Court[57] has, however, held that the rights of an adopted son are extinguished in his natural family irrespective of whether the adoption takes place during the lifetime or after the death of the natural father. This view is more in consonance with the Privy Council decision in Raghuraj Chandra v Subhadra,[44] as a result of which the earlier contrary decisions of the courts in the Mitakshara provinces may be deemed to have been over-ruled.

In the case of Vijaysingji v Shivaangji[58] the Privy Council left the question open as it became unnecessary in

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54. Maroti v Luxmen [1922] A.I.R. Nag. 16.
55. Chhanga v Jai Lal [1924] A.I.R. Lah. 480.
56. Rulia Ram v Mst. Sodhan [1930] A.I.R. Lah. 470.
57. Dharam Singh v Bakshi A.I.R. 1926 All. 425.
58. (1935) L.R. 62 I.A., 161, 165-166.

that case to decide whether the son upon being adopted out of the family, retained the estate which he had inherited from his natural father before the adoption.

On the question whether the adoptee is divested of property vested in him before the adoption, the conflicting views of the different courts seem to have arisen in view of the fact that the Smritis are not explicit on this specific point. The Smritis seem to have contemplated the adoption of a child almost immediately after his birth or at the earliest time thereafter (before the age of 5) and the complications seem to have arisen on account of the adoptions being made in certain cases of comparatively mature young persons. It is settled, however, that an adopted son is not dispossessed of any self-acquired property in his possession at the time of adoption. As to the joint family property whether obtained by inheritance or partition, it appears that the views of the Bombay and Allahabad High Courts and approved by the P.C. in Raghuraj Chandra v Subhadra[44] are more in consonance with the intentions of the Smriti writers. The meaning of Manu's verse IX, 142 is clear and the words seem to be wide enough to include the estate vested in him at the time of adoption. For even the share of joint-family property obtained on partition remains technically 'ancestral property' as the sons, grandsons and great grandsons would acquire equal rights in such property on their birth whereas in self-acquired property the owner has unfettered rights of disposal etc. Further, as the adopted son is relieved of his obligation to offer funeral offerings to his natural father and acquires full rights in the estate of his adoptive father, it would be but equitable that he be made to wash his hands completely of his natural

father's estate.

Professor Derrett, however, observes[59] that the preferable view is the one taken by Madras,[46] more recently vindicated in Rakhalraj v. Debendra,[60] where the Calcutta High Court investigated the meaning of Manu's text more thoroughly, and showed that the adopted son was prohibited from taking with him (or subsequently inheriting) only what was not vested in him at the time. Also referring to the provision of S.12(b) of the Hindu Adoption and Maintenance Act, 1956, according to which any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations of maintenance of relatives, etc. attaching to the ownership of such property, Derrett observes[61] that as a result the natural family may suffer inconvenience thereby. But this is seldom serious, firstly because children with property of their own rarely leave in adoption and secondly because the property continues to vest in him or her subject to all obligations and rights of maintenance of others attaching to the ownership.

Position under Customary laws.

Under the Punjab customary law, it has been held that the customary appointment of the heir did not involve transplanting from one family to another. Hence the son of the appointed heir who predeceases the appointer does not succeed to the adoptive father's property.[62] The descendants of the adoptee can succeed to the estate of the adopted son's natural family even in the presence of descendants in the natural

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59. J.D.M. Derrett: Introduction to Modern Hindu Law (1963), para. 174.
60. A.I.R. 1948 Cal. 356, 359b, 361b.
61. J.D.M. Derrett: Introduction to Modern Hindu Law (1963), para.171.
62. Mela Singh v. Gurdas (1922) 3 I.L.R. Lah. 362 (F.B.) For further discussion of the topic see page 214 ff.

family.[63] In Gujjar Singh v. Sunder Singh Kapur J. observed that in the customary adoption of a son the tie of kinship with the natural family is not dissolved and the fiction of blood relationship with the members of the new family has no application to the son. Therefore to the son of the adopted son, the heirs are not the collaterals of the adoptive father but those persons who are natural heirs.[64] In Inder Singh v. Kartar Singh,[16e] Dua J. observed that under the rules of Punjab custom adoption is in no sense connected with religion and appeared to be a purely secular arrangement resorted to by a sonless owner of land in order to nominate a person to succeed him as his heir, the object being not to secure spiritual or religious benefit but to obtain practical temporal benefit. It is in essence an appointment of an heir and created only a personal relationship between the appointed heir and the appointer in that the appointed heir does not become the grandson of the appointer[64a]. These cases are governed mainly by customary law and not by the rules of Dattaka adoption, for the customary appointment of an heir does not involve transplanting from one family to another and the tie of kinship with the natural family is not dissolved. Also among the Gayaswal Brahmins of Gaya there exist peculiar and loose customs in regard to adoption whereby the adopted son has rights of succession in both families and the adopted child does not lose his rights in the natural family.[65]

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63. Ishar v. Hukam Singh A.I.R. 1923 Lah. 485.
64. A.I.R. 1955 NUC (Punj.) 4998.
64a. A.I.R. 1966 Punj. 258 (260) para. 7.
65. Lachman Lal Chaudhri v. Kanhaya Lal (1895) 22 I.L.R. Cal. 609, 618 (P.C.).

The effects of adoption in the various customary forms and in forms other than the Dattaka are dealt with in Chapter IX of this thesis, which may be referred to.

The Present Law

Now under section 12(b) of the Hindu Adoption and Maintenance Act, 1956, the adopted child shall not be divested of any property which might be vested in him prior to his

adoption. However the adopted child continues to hold the property subject to the obligations, if any, attached to its ownership. Such obligation includes the obligation to maintain relatives in the family of his or her brith as are mentioned in Section 21 of the said Act.

English Law on the Subject

Adoption has been legally recognised comparatively recently in England, the earliest enactment being the Adoption of Children Act, 1926 followed by the Adoption Acts of 1950 and 1958. The effects of adoption are dealt with in S. 5 of the 1926 Act, Sections 10 to 14 of the 1950 Act and Sections 13 to 19 of the 1958 Act. The sections deal with the consequences of adoption in English law in relationship, citizenship, proprietary rights, industrial insurance, marriage law, affiliation proceedings etc. Section 13(1) of 1958 Act repeats the provisions of the earlier Acts (1950 Act S. 10(1) and the 1926 Act S. 5(1)) and deals with the guardianship rights and obligations concerning the adopted child. It states that on an adoption order being made, all rights, duties, obligations and liabilities of the parents or guardian in relation to the future custody, maintenance and education of the adopted child, including all rights to appoint a guardian or to consent to or give notice of dissent from marriage, are extinguished and vest in and are exercisable by and enforceable against the adopter as if the adopted child had been born to the adopter in lawful wedlock, and in respect of these matters the adopted child stands in relation to the adopter exclusively in the position of a child so born.

According to Section 12 of the 1950 Act, where an

unmarried mother adopted her illegitimate child, any affiliation order or agreement under which the putative father of the child contributed to its maintenance continued after the adoption until the child's mother married. Section 15 of the 1958 Act, however, provides that when an adoption order is made in respect of an infant who is illegitimate, any affiliation order in force with respect to him and any agreement whereby his father has undertaken to make payments specificially for his benefit, shall cease to have effect (without prejudice to recovery of arrears to the date of the order) unless the infant is adopted by his mother, being a single woman. Thus the provision of the 1950 Act which terminated the affiliation order if the mother later married were superseded. The marriage of the mother (after the 1st April 1959) has of itself no effect on the currency of the order or agreement, but a court may nevertheless revoke or vary because of the marriage so much of an affiliation order as provides for money payments.[66] For, as observed in the Hurst

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66. Compare Children Act, 1958, S. 22(4). In a recent case S (P.D.) v. S(E) Law Report, July 16th, 1971, discussed in the Times of 17.7.71, the question whether a husband had accepted his wife's illegitimate children as children of the family and was therefore liable for their maintenance, was held to be an objective question of fact which had to be determined as at the date of the marriage. Accordingly, if he had accepted them on marriage, the wife's subsequent withdrawal from him of authority over them did not affect his liability to maintain them, nor did an affiliation order against their natural father extinguish his liability.
The husband had contended that after the marriage his wife had withdrawn them from his control and that that breach of control should release him from future liability. He also argued that since their natural father was known it was the father's liability to support them in full and that therefore he should not have to pay anything. The Divisional Court could accept neither contention. In the Court of Appeal their Lordships, Davies and Buckley agreeing said that some authorities tended to suggest that acceptance meant there must be an offer, with which their Lordships disagreed and observed that that was not the law of contract. Acceptance in relation to a child meant that the child would be taken into the house of the newly married couple.

Committee Report[67] such a provision was considered as being obsolete as the step-father is not responsible financially for his step-children, but the putative father could apply for variation or discharge of the order on the plea of changed circumstances.

It may be pointed out here that in Hindu Law, adoption under the Hindu Adoption and Maintenance Act (which permits the adoption of illegitimate children)[67a] will not cancel an order for maintenance under S. 488 Criminal

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67. Cmd. 9248 para. 199.

67a. At Anglo-Hindu law an illegitimate child could not be adopted, for his incapacity to perform Sradh for his natural father was felt to deprive him of capacity to give spiritual benefit to the adoptive parent. See J.D.M. Derrett: Modern Hindu Law (1963) paras 163 and 128.

Procedure Code.[68] In the textual Hindu law there is no express text disallowing the adoption of illegitimate children. Also, as observed by their Lordships of the Allahabad[69] and Madras High Courts[70] the Hindu law does not, like the English law, consider an illegitimate person quasi nullius filius. It recognizes his relationship to his father and family, and secures him substantial rights. Under the ancient law it seems that at one time in the case of the three superior or "regenerate tribes" sons not born in lawful marriage had rights of inheritance subsidiary to the "Aurasa", or son by a lawful wife and could perform obsequies[71] and although this as a general law applicable to those tribes had, in respect of inheritance, become obsolete yet, as their Lordships of the Madras High Court observed[70] 'it is clear law at the present day that by birth and without any form of legitimation, illegitimate children of those tribes are recognised as members of their father's family, and have a right to maintenance. It is also equally clear that in the case of Śūdras the law has been and still is that illegitimate children succeed their father by right of inheritance'.[72] In Inderun Valungypoly Taver v Ramasawmy Pandia Talaver[73] their Lordships of the Privy Council

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68. The Code of Criminal Procedure, A.I.R. Publication 3rd edition, Vol. III, pp. 2569-2570.

69. Ram Kali v Jamna (1908) I.L.R. 30 All. 508, 509.

70. Pandaiya Telaver v Ruli Telaver (1863) 1 Mad. H.C.R. 478, 482.

71. Manu IX, 159, 160, 180; Mitakshara I, XI; 2 Strange's H.L., 196-211.

72. Mit. I, XII; Strange's H.L., 1, 132.

73. (1869) 13 Moo., I.A., 141.

held that the illegitimate children of the Sudra caste, in default of legitimate children inherit their putative father's estate. In Sarasuti v Mannu,[74] Pearson and Oldfield, JJ., held that the illegitimate offspring of a kept woman, or continuous concubine, amongst Sudras, are on the same level as to inheritance as the issue of a female slave by a Sudra, and that the illegitimate son of an Ahir by a continuous concubine of the same caste took his father's estate in preference to the daughter of a legitimate son of his father who died in the father's life-time. In Hargobind Kuari v. Dharam Singh,[75] Straight, O.C.J. and Duthoit J., held that, according to Hindu law and usage, illegitimate sons are entitled to maintenance from their father, and his estate is liable for such payment.[75a]

Section 15(2) of the 1958 Act clarifies a hitherto dubious point and prohibits the making of an affiliation order or decree of affiliation and aliment after an adoption order has been made in respect of an infant who is illegitimate, unless the adoption was made on the application of the mother of the infant alone.

It should however be noted that the 1926 Act only transfers the guardianship rights and obligations from the natural parent to the adopter and specifically lays down in Section 5(2) that an adoption order shall not deprive the adopted child of any right to or interest in the natural father's family nor confer on him any right to or interest in the adopters property as a child of the adopter. Under the later Acts i.e., the 1950 and 1958 Acts the adopted child

74. (1879) I.L.R. 2 All., 134.
75. (1884) I.L.R., 6 All., 329.
75a See also article by J.D.M. Derrett: Inheritance by, from and through Illegitimates at Hindu Law; 1955 57 Bom. L.R.J., 1 ff. and also by the same author: More about Illegitimacy at Hindu Law; 1955 57 Bom. L.R.J., 89 ff.

is "for any purpose treated as the child of the adopter" including devolution of the adopter's property as if the adoptee were the child of the adopter, and his exclusion from succession in the natural family and vice versa. Referring to the effects of adoption under the 1926 Act, in the case of Coventry Corporation v Surrey County Council,[76] one W.W.H. was born an illegitimate child in the county of Leicester and lived with a foster-mother in the county borough of Leicester until he was eleven years of age. He was then, by an order under S. 1 of the Adoption of Children Act, 1926, adopted by one C.H.W. and his wife, with whom he lived continuously for four years in the county borough of Leicester, from which place the adopters were irremovable and in which they were settled at the date of the order. A few days after he had reached the age of 16 years the child became chargeable to the county of Surrey (as he was an inmate of the Gordon Boys Home at Woking in Surrey). The justices of Surrey ordered his removal to Coventry where his mother was then last settled. It was held by the Privy Council on appeal that the order for removal must be quashed.

Lord Atkin observed:

> "It is to be observed that the Act does not put the adopter and the child into the position of natural parent and child for all purposes. But as to the matters enumerated in subs. (1), custody, maintenance and education, it does in the plain language transfer from the natural parent to the adopter the whole of the rights and obligations that flow from parenthood".

Thus an adopter may appoint, not only a testamentary guardian

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76. [1935] A.C. 199 at p. 205.

of the child to act after the adopter's death;[77] but, under Section 4 of the Guardianship of Infants Act 1925, even the survivor of a husband and wife who jointly adopt an infant becomes its statutory guardian. Also under the same Act an order for the maintenance of an adopted child may be made against its adopter.[78] The Coventry Corporation case may still be useful in the light it may shed on the effect of adoption in the interpretation of enactments affecting aspects of family relationship not dealt with specially in the Adoption Acts.

As regards the rights of succession of the adoptee, the 1926 Act (S. 5(2)) specifically laid down that an adoption order did not deprive the adopted child of any right to or interest in the natural father's property, nor did it confer on the adopted child any right to or interest in the adopter's property as a child of the adopter. This position was virtually reversed as regards devolution on a death occurring on or after 1st Jan. 1950 and Sections 16 and 17 of the Adoption Act 1958 repeats that provision.

Section 16(1) enacts that, where, at any time after the making of an adoption order, the adopter or the adopted person or any other person dies intestate in respect of any real or personal property, that property shall devolve in all respects as if the adopted person were the child of the adopter born in lawful wedlock and were not the child of any other person. Also Section 16(2)(b) lays down that in any disposition of real or personal property made, whether by instrument inter

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77. Guardianship of Infants Act, 1925, S. 5; Adoption Act 1958, S. 13(1).

78. Skinner v Carter [1948] Ch. 387.

vivos or by will (including codicil) after the date of an adoption order any reference (whether express or implied) to the child or children of the adopted person's natural parents or either of them shall, unless the contrary intention appears, be construed as not being or as not including, a reference to the adopted person. It should be noted that, for a disposition to be affected in its construction by S. 16(2) of the Act, it must have been made after the date of the adoption order. In the case of instruments inter vivos, the dispositions are obviously made on the date of their execution even though according to the terms of the disposition it is to take effect at a later date. The law was, however, formerly silent as to the date on which a disposition by will or codicil was to be regarded as "made". In the case of Re Gilpin[79] it was held that the Legislature meant to indicate the date of execution of the will or codicil incorporating the disposition and not the date of death of the testator from which the disposition itself speaks. But now under S. 17(2) of the 1958 Act the position as regards wills and codicils made after March 1959 is completely reversed. According to this section a disposition made by such a will or codicil is treated for the purpose of S. 16(2) as made on the death of the testator. So also a codicil executed after March 1959, if in accordance with the ordinary rule of law[80] will enable the disposition to be treated under the Act as made on the date of the testator's death, though the will preceded the

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79. [1954] Ch. 1.

80. Discussed by Harman J. in In re Heath's Will Trusts [1949] Ch. 170.

Act and the adoption order.[81] This is a rule which avoids anomaly and is much easier to understand.

In Re Jones' Will Trusts, Jones v Squire[82] in 1949 a testator made a will by which he gave his residue to be divided equally amongst his seven named nephews and nieces including Mrs. H. in equal shares per capita as tenants in common. On Sept. 1, 1953, the testator made a codicil containing a substitutionary provision whereby if any nephew or nieve died in his lifetime leaving children living at his death such children were to take by substitution the deceased parent's share. On Nov. 11, 1958, the first defendant, a child of Mrs. H. was adopted by a stranger to the family. In 1959 and 1963 the testator made new wills, which incorporated the residuary provisions of the previous will and codicil. There was evidence that before making his wills in 1959 and 1963, the testator was aware that Mr. H. had died in 1953 and that the first deft. had been adopted and that in a conversation sometime after making the will of 1959 the testator had referred to the first and second deft.'s, as being entitled to share in the testator's estate. Under the Adoption Act 1958, (C. 5) S. 16(2)(b) the testator's will had to be read as though the first deft. were not included in the reference to the children of Mrs. H. unless "the contrary intention appears". It was held that the contrary intention required to satisfy the words "unless the contrary intention appears" in Adoptton Act 1958 (C. 5) S. 16(2)(b) might appear from

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81. Sched. V, para. 4(3).

82. [1965] 2 All E.R. 828; [1965] Ch. 1124; [1965] 3 W.L.R. 506.

any surrounding circumstances which must be really cogent and convincing. The history of the testator's testamentary dispositions was admissible in determining whether the relevant contrary intention appeared and the evidence (a) that the scheme of the testator's testamentary dispositions had remained unchanged in this respect since the codicil of Sep. 1, 1953 and (b) that at some date after his will in 1959 (though not after his will of 1963) he had referred to the first deft. as being entitled to share in his estate, was sufficiently cogent to carry conviction of a contrary intention within Sect. 16(2)(b) on the part of testator viz., that the first deft. was entitled to benefit from his gift in favour of the children of Mrs. H.

The decision in this case is of great practical importance and stresses the significance of the words "unless the contrary intention appears" used in Section 16(2)(b). Although S. 16(2)b lays down that in any disposition of property intervivos or by will after the date of an adoption order, any reference to the child or children of the adopted person's natural parents will be construed as not being or as not including, a reference to the adopted person it provides an exception in the case where a contrary intention appears. As observed by their Lordships in Re Jones' case[82] the contrary intention might appear from any surrounding circumstances which must be really cogent and convincing. In the case under review the contrary intention was inferred from the testator's conversations with other members of the family.[83]

In Re Brinkley's Will Trusts, Westminster Bank Ltd.

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83. Bromley: Family law (3rd edn), p. 413.

v Brinkley,[84] however, a testator A, made his will on May 5, 1899 whereby he settled his residue equally on each of his children for life and, from and after the death of each child his or her share was to be held "upon trust for all or any one or more of the children or remote issue of such child (but so that such remoter issue be born in the lifetime of such deceased child) ... as such deceased child shall by will appoint and in default of such appointment ... in trust for the children or any child of such deceased child ... in equal shares". After A's death leaving five children including B who had one child only C, in 1950 C and his wife who were childless, adopted two children. In 1951 B executed his will and made an appointment thus:

> "I hereby direct and appoint that the trustees ... of the will of my father ... shall after my death stand possessed of my share in the said trusts fund upon trust absolutely for all or any of my grandchildren or grandchild who shall be living at the expiration of twenty-one years after my death ..."

In 1956 C's marriage was dissolved and he remarried in 1957 and a son was born to C by his second wife. On the question whether the appointment operated in favour also of C's adopted children, it was held (i) a person taking under the appointment made by B's will took as a result of the disposition made by A's will, the appointment being only the means of carrying out A's dispositions; and the disposition for the purposes of Adoption Act, 1950 (C. 26) S. 13(2) was A's will; accordingly, as Sect. (13)(2) operated only in respect of a disposition made after the adoption order, it did not apply to the

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84. [1967] 3 All E.R. 805; [1968] Ch. 407; [1968] 2 W.L.R. 217.

disposition made by A's will, (2) further, the reference to "my grandchildren" in B's will did not extend to C's adopted children but only to grandchildren of B, born in lawful wedlock.

In this connection it may be pointed out here that the problem whether "child" includes an adopted child is also found in Indian law. As pointed out by Derrett[85] for purposes of inheritance[86] and maintenance[87] an adopted child is on the same footing as a legitimate child. The adopted child is prohibited from marrying an adoptive sapinda or 'prohibited relation' (unless customs permit either),[88] as if he were a blood relation of those relations by adoption.[89] For purposes of guardianship also the adopted child is placed upon the same footing as a legitimate child.[90] The position appears to have been made clearer still by S. 12 of the Hindu Adoption and Maintenance Act which lays down that an adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption.

Similar is the position of the adopted child under the English law under the recent adoption Acts of 1950 and 1958. I am therefore of the opinion that the decision in the above case[84] to the effect that the reference to 'grandchildren'

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85. Introduction to Modern Hindu Law: J.D.M. Derrett (1963) p. 121.

86. Hindu Adoption and Maintenance Act Section 12.

87. Gen. Clauses Act, 1897, S. 3(53); HAMA, S. 12.

88. Hindu Marriage Act, S. 5(2).

89. Hindu Marriage Act, S. 3 expl. (iii).

90. Hindu Minority and Guardianship Act, S. 7.

does not extend to the child's adopted children requires reconsideration, as it would be contrary to S.16.2.(c). of the Adoption Act 1958 (See P.140).

Section 13(3) of the 1958 Act deems an adopter and the person whom he has been authorised to adopt under an adoption order to be within prohibited degrees of consanguinity for the purpose of the law relating to marriage. This statutory relationship continues notwithstanding that the adopted person is subsequently re-adopted by another person (it may however be noted that such re-adoptions are impossible in Hindu law). The latter provision would seem to imply that prohibited degrees of consanguinity vis-à-vis the adopted child would also continue in the natural family for the purpose of the law relating to marriage even after an adoption order. The silence of the statutes does not seem to be a sufficient guide on the matter.

A perusal of the above résumé would show that there is a great similarity between the English and the Hindu laws in the sense that under both laws there is almost "complete severance" of the adopted child from the natural family. In many other countries (as in shown in a subsequent discussion)[91] the laws of inheritance do not appear to be as strictly logical, wherein normally an adopted child inherits from the adopter as if he were a natural child but usually the adopter does not inherit from the adopted child. Commonly also, the adopted child does not inherit from his relatives by adoption and keeps the right to inherit from his natural family.

However, there seem to be some differences between the English and the Hindu law, for example, as to the question

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91. Please refer to pages 161 to 169.

whether the adoptee is divested of property vested in him before adoption, there was previously a difference of opinion between the various Indian courts based on the different interpretations of Manu's verse IX, 142 that the given son is not to take the 'gotra' and 'riktha' of his natural father.[92] But now under Section 12(b) of the Hindu Adoption and Maintenance Act 1956, the adopted child is not to be divested of any property which might have vested in him prior to his adoption, which corresponds to the English law on the subject, and this will exclude an interest in Mitakshara joint family property, which is not in practice an important exception to the general proposition. Also as regards prohibition for the purpose of marriages etc., it would appear that the effect of Section 13(3) of the 1958 Act is to maintain the prohibited degrees of consanguinity in the natural family vis-à-vis the adopted child for the purpose of the law relating to marriage even after the adoption order. Under the Hindu law whilst the prohibitions of marrying 'sapinda' relations in the natural family continued even after adoption, it would appear from the decision in Madhavrao v Raghvendrarad[93] that a Hindu may marry a girl belonging to his natural father's gotra after she is adopted into a different gotra.

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92. For a discussion please refer to pages 79 et seq.

93. A.I.R. (1946) 33 Bom. 377.

CHAPTER III

RIGHTS OF ADOPTEE IN THE ADOPTIVE FAMILY

. The Concept - "A child for all purposes"

Directives of Smriti-writers

Manu, Brihaspati and other Smṛiti writers divided the twelve kinds of sons[1] into two classes viz. the 'bandhu-dāyādas' (which means those inheriting to the Bandhus or collaterals) and 'abandhu dayadas' (i.e., those not succeeding to the Bandhus but inheriting only from their adoptive fathers), which has a far-reaching consequence on the inheritance of the secondary or fictional sons including the dattaka. Yajnavalkya and Vishṇu, however, ignore the distinction between 'bandhu-dayadas' and 'abandhu-dayadas'.[2]

The code of Manu classes Aurasa, Kshetraja, datta, Kritrima, Gudhotpanna and Apaviddha in the bandhu-dayada class,[3] and the latter six i.e., Kānīna, Sahodha, Krīta, Paunarbhava, Svayam-datta and Śaudra as the a-dāyāda bandhus, thus

> "Among the twelve sons of men whom Manu, sprung from the self-existent, enumerates, six are kinsmen and heirs, and six are not heirs, (but) kinsmen. ..... These eleven, the Kshetraja and the rest as enumerated above, the wise call substitutes for a son, (taken) in order (to

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1. Read pages ante pp. 14 to 16; Manu IX, 158; Yājñ II, 128-132. Also see Kane 'History of Dharmasastra' Vol. III (1946 edn.) p. 645; G.S. Sastri Hindu Law (seventh edition) p. 191; J.D. Mayne 'Treatise on Hindu Law & Usage' (eleventh edition) p. 107.

2. Chandreshwar Prasad v Bisheshwar Pratap (1926) I.L.R., 5 Pat. 777, 846 et seq.

3. IX, 158-159.

prevent) a failure of the (funeral) ceremonies".[4]

No such division is known to Baudhayana but Harita is quoted in the Vyavahāra Mayūkha as placing the datta as the first among the 'a-bandhudayadah'. Gautama calls his groups of six each as 'Rikthabhajah' and 'Gotra-bhajah'[5] i.e. 'inheritors' and 'bearers of gotra-names' Narada[6] and Devala (quoted in the Vyavahāra Mayūkha) divide their enumerations of the twelve sons into two divisions of six each under 'bandhu-dayadas' and 'a-bandhu-dayadas'. The two terms denote that the first class of sons will succeed to collaterals, while the latter will inherit lineally or more strictly from their adoptive fathers only. By counting the dattaka son below the first six, the metrical Dharmaśāstras except Manu and Brihaspati exclude the collateral succession of the dattaka and Kritrima amongst others. Brihaspati calls datta, apaviddha, Krīta and Krita, 'ṛiktha-sutāḥ', 'inheriting sons'.

Yājñavalkya and Viṣṇu, however, ignore the distinction between "bandhu-dayadas" and "abandhu-dayadas". According to Yājñavalkya "Of these twelve sons, failing each preceeding one the other gives the pinda and takes the inheritance".[7] Viṣṇu says "Amongst these (sons) each precedent one is preferable (to the one next in order)".[8]

According to Kauṭilya[9] "The son produced by the

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4. IX, 160.

5. XXIX, 32-33.

6. XIII, 47, V.M.

7. Yājñ. II, 132.

8. XV, 1, 28-32.

9. Book III, Chapter VII, 164. See also Shamasastri's Translation of Kautilya's Arthaśāstra (1915) P. 209.

father inherits also (from) the relatives of the father, that one produced by another, inherits (from the father) who performs his sacrament, and does not inherit (from) the relatives (bandhus). Such (the latter) is the status of the datta (son)".

(b) Interpretation by the Commentators

The commentators met the problem and all over India except Bengal, unanimously rejected the limitation on the dattaka's capacity. Asahāya, the oldest known commentator, in spite of his being the commentator on Narada, who places the Dattaka son amongst the non-bandhu dayadas, counts the dattaka as the third.[10] Asahāya expressly holds that he inherits from both his adoptive father and that father's relatives (jñātis). Viśvarūpa, the oldest commentator of Yajuavalkya and a high authority, writing on Yajn. II. 132, cites Manu in preference to others and bases his opinion on his text. Similarly Vijñāneśvara[11] refuses to recognise the distinction even of Manu, and explains away the difference between Manu and others 'as founded on the difference of the sons' personal qualities. This interpretation is adopted by all subsequent writers of every school e.g. Devanna Bhatta[12] and Chandeśvara.[13] Mitra Miśra,[14] after a masterly review of the different authorities notices the conflict

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10. Jolly, Nārada (including Asahāya). Asahāyācārya cited by Candeśvara in the Vivada Ratnakara.

11. On Yajnavalkya II, 132, Mit. 1. II, 30-35.

12. Smriti-Chandrika.

13. Vivada Ratuakara, p. 551.

14. Viramitrodaya pp. 618-621.

> 'Here is a conflict with Manu clearly'... 'this is to be removed by referring the (opposing, contrary texts) to a difference in caste or local custom, that is, the other texts being contrary to Manu, they have to be taken as referring to the adoption of a lower-caste son or to a local custom contrary to Manu'.

The Dattaka Chandrikā [15] says

> 'The doctrine of one smriti writer that the son given is heir to kinsmen and that of another that he is not such heir are to be reconciled by referring to the distinction of his being endowed with good qualities or otherwise'.

The author of the Sarasvatīvilāsa[16] counts him as fourth. Similarly Mādhava rejects Hārīta [17] and the Madana Parijāta follows the order given in the Subodhinī on the Mitākharā.[18] Jimutavahana is not explicit on the point, but according to Justice Mitter's explanation of the relevant verses of the Dayabhaga[19], it would appear that the dattaka son falls within the 'first six sons ' and hence entitled to inherit collaterally.

The Dattaka Mīmāṁsā and the Dattaka Chandrikā are of the view that the adopted son is a substitute for the Aurasa son for purposes of inheritance as well as for purposes of funeral oblations.[20]

The Courts in India, however, have laid down a rule based upon the principle of equity and justice - the principle being that the adopted son should have the same rights in the family of his adoption, as he loses in the family of his birth, unless there be express texts curtailing the same. Thus the

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15. V, 22-24.
16. Para. 386, Setlur's Transl., p.161.
17. Para. 52, Setlur (p.330).
18. Setlur, p. 521.
19. K, 7-8. Also see Justice Miller's explanation (see pp.174-5).
20. Dat. Mim. VI, 50-53. Dat. Ch. III, 17, 20 and V, 24.

(Continued on next page)

Footnote 20 continued from previous page (106).

20. It was observed in Nagammal v. Sankarappa A.I.R. 1931 Mad. 264 that the main purpose of adoption is to secure the due performance of obsequial ceremonies for the adopter and that the perpetuation of lineage was also another object for making an adoption. As such the existence of a son incapable of performing those ceremonies such as one suffering from a virulent and loathsome form of ulcerous leprosy cannot serve the purpose of sonship and the existence of such a son can be ignored and an adoption made. A similar view was taken by the Bombay High Court in the case of a person affected by dumbness which is congenital and incurable. (Bharmappa v. Ujjangauda, A.I.R. 1922 Bom. 173). Although Yajnavalkya does not mention a dumb person among those disqualified from inheritance but Vijnanesvara includes him in the list under the word 'Adya' on the authority of Manu. However, the Bombay High Court held in Krishnaji v. Raghavandra, A.I.R. 1942 Bom. 178 that under Hindu Law a person having a son subject to disqualifying defects cannot be treated as sonless. In view of the recognised possibility of an idiot's son being cured and his begetting a son free from disqualifying defects, and in view of the absence of a positive statement anywhere in the texts that the expression 'Aputrena' includes a person having a son incapable of inheriting or performing the funeral rites, an adoption during the lifetime of a son who is a congenital and incurable idiot is invalid. This view of the Bombay High Court has been rightly criticized by Derrett as erroneous. See his Modern Hindu Law (1963), para. 155.

courts have laid down that as regards inheritance the adopted son has the same rights as an Aurasa son of the adoptive parents,[21] except in competition with an after-born legitimate son of the adoptive father in which case he gets a reduced share on account of express texts in this regard.[22]

Rights in the coparcenary and separate property of the Adoptive father (where the adoption is by the father)

According to the Dattaka Mīmāmsā and the Dattaka Candrikā an adopted son is entitled to inherit not only to his adoptive father but to the adoptive father's father and other more distant lineal ancestors as in the case of an Aurasa son.[23] In a Dayabhaga case, a majority of fifty-one pandits attached to various courts were of the opinion that in case of a conflict between Manu and the Dayabhaga the former was to be preferred and according to the Bengal school an adopted son could inherit to his adoptive grandfather.[24]

As to the nature of the right of an adoptee the Madras High Court laid down in Yethirajulu v Mukunthu[25] that the right of an adopted son is analogous to that of an appointee under a power given by the donor as regards the effectuation of the gift and the gift to an appointee will be

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21. (1881) I.L.R. 6 Cal. 257, 259-260 (F.B.); Dattatraya v Gangabai (1922) I.L.R. 46 Bom. 541; Tirumal v Rangadami (1912) 23 M.L.J. 79, 97.

22. Nagindas Bhugwandas v Bachoo Hurkissondas (1916) 7 I.L.R. 40 Bom. 270, 279 (P.C.); Pratapsingji v Agar Singhji (1919) I.L.R. 43 Bom. 778 (P.C.); Mah. of Kolhapur v Sundaram Iyer (1925) I.L.R. 48 Mad. 1.

23 Dat. Mim. VI, 3, 8; Dat. Chand. V, 26, III, 20.

24. Gourbullah v Jaggernath F. Mac. Cons. H.L. 159-166 (the case came to be heard on 24 March 1824).

25. (1905) I.L.R. 28 Mad. 363.

good if he be a person in existence at the testator's death. Their Lordships referred to Bai Motivahoo v Bai Mamoobai[26] wherein the P.C. upheld a power given by a testator to another to appoint by will the person who was to take the property of the testator, relying for the recognition of such a power on the analogy of the power to adopt which the husband may give to his widow and declared that gifts made under a power to appoint will be valid so far as they are made to persons in existence at the death of the testator. Just as in that case the gift takes effect on the appointment being made so in the present case the gift takes effect on the adoption being made. Such adopted son would be taken in point of law as in existence at the testator's death and his case would be treated as an exception to the rule about existence of donee at donor's death[27] and that 'grandsons being my sons' sons' include grandsons by adoption, excluding illegitimate sons.

As regards the rights of an adopted son in coparcenary property, an adopted son, as soon as adopted, becomes a coparcener with the adoptive father with the right of survivorship and of partition; and the latter cannot dispose of any joint family property without justification, or the adoptees consent. At the moment of death, the right of survivorship i s in conflict with the right by devise and the title by survivorship, being the prior title takes precedence to the exclusion of that by devise.[28] However now under the Hindu

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26. (1897) L.R. 24 I.A. 93 (J.C.).

27. Tagore v Tagore, (1872) 18 W.R. 359.

28 Vitla Butten v Yamenamma (1874) 8 M.H.C.R. 6; Parmanand v Shiv Charan Das (1921) I.L.R. 2 Lah. 69; 59 I.C. 256; Krishnamurthi Ayyar v Krishnamurthi Ayyar (1927) I.L.R. 50 Mad. 508, 515 (P.C.); Mt. Aki v Kundanlal (1911) P.R. No. 74 p. 283; Section 30, Hindu Succession Act 1956.

Succession Act 1956, the law on this point has been modified and a Hindu may now dispose by will or other testamentary disposition of his share in the joint family property.[29] The rights of the adopted son become, on adoption, indefeasible either inter vivos or by will[30] (except as modified by the Hindu Succession Act, mentioned above). The father cannot alienate the son's interest by will. There seems to be, however, a difference of opinion between the Smriti writers on the father's powers of alienation of ancestral property vis-à-vis the sons whether Aurasa or adopted. Whilst the text of Manu and Nārada admit the father's absolute rights over the property, whether ancestral or self acquired[31] (with which view the Arthaśāstra of Kauṭilya concurs),[32] the Smṛitis of Viṣṇu, Yājñavalkya and Bṛihaspati make the sons joint owners with the father in respect of ancestral property,[33] though conceding his absolute right in self-acquired property.

Under the Mitakshara law, the adopted son acquires a vested interest in the ancestral property of his adoptive

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29. Section 30, Hindu Succession Act 1956. But under Sec. 6 only when no female relation, etc., survives.

30. Venkatanarayana v Subbammal (1916) I.L.R. 39 Mad. 107; 32 I.C. 383 (P.C.); Rungama v Atchama (1846) 4 M.I.A.1, Bhyri Appamma v Chinnammi (1920) 58 I.C. 511; Vitla Butten v Yamenamma (1874) 8 M.H.C.R. 6; Sudanand v Surju Monee (1885) 8 W.R. 455; Ganpathi v Savithri (1897) I.L.R. 21 Mad. 10, 14; Parmanand v Shiv Charan Das (1921) I.L.R. 2 Lah. 69, 59 I.C. 256; Mt. Aki v Kundanlal (1911) P.R. No. 74, p. 283.

31. Manu, IX, 104; Nar. XIII, 15.

32. Arthas, III, 5.

33. Vishnu XVII, 2; Yajn., II, 121; Brih. XXV, 2, 3; Also Mayne: Hindu Law; 1953 edn. Chapter VIII p. 315 et seq.

father, on adoption and does not become divested of such interest although its size at an eventual partition may be altered by the birth of real sons.[34] In a case where an aurasa son and an adopted son survived the father and the former died without issue the latter took the whole estate by survivorship.[35]

A conveyance by a Hindu, without male issue at its date, will bind his subsequently born or adopted male issue, as such issue at birth or adoption respectively take a vested interest in such property only as it is at that time.[36] In respect of self-acquired property it has been held that an adopted son does not stand in a better position, with regard to the self-acquired immovable property of his adoptive father, than a natural born son would occupy; and there is nothing in the Hindu law to prevent a father from disposing of his property by an act intervivos[37] or by will[38] and so defeating the rights of inheritance of his adopted son. In Karam Singh

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34. Birbhadra v Kalpataru (1905) 1 C.L.J. 388; Amarendra v Banamali (1930) I.L.R. 10 Pat. 1.

35. See note to Ayyavu v Niladatchi (1862) 1 Mad. H.C.R. 45 (49); Venkatanarayana Pillai v Subbammal (1916) 43 I.A. 20, 23, 39 Mad. 107.

36. Rambhat v Lakshman (1881) I.L.R. 5 Bom. 630; Gangubai v Ramanna (1866) 3 Bom. H.C.R.(A.C.J.) 66; Vrandavandas v Yamunabai (1875) 12 Bom. H.C.R. 229; SIVARAMAKRISHNAN V KAVERI A.I.R. 1955 Mad. 705.

37. Rangama v Atchama (1846) 4 M.I.A. 1; 7 W.R. P.C. 57.

38. Purshotam v Vasudev (1871) 8 Bom. H.C. 196; Sri Raja Venkat Surya v The Court of Wards (1899) I.L.R. 22 Mad. 383, 390 (P.C.); Subba Reddi v Doraisami (1907) I.L.R. 30 Mad. 369.

v Mt. Rup Wanti[39] the Lahore High Court opined that the argument that under Hindu law self-acquired property becomes joint immediately upon adoption of a son is not supported by any authority and in fact is in direct contradiction to views of text writers, and held that under the Hindu law, self-acquired property does not become joint immediately on the adoption of a son. To convert self-acquired property into joint property, a clear intention to waive the separate right of the owner must be established. Such intention will not be inferred from acts which may have been done out of kindness and affection. The mere tie of adoptive father and son is not sufficient to show an intention to convert self-acquired property into joint property. Also the mere fact that a Hindu and his adopted son lived together is not sufficient to show an intention, on the part of the father as owner of his self-acquired property to throw it into the common stock for the benefit of both himself and his adopted child, so as to make the property, joint property.[40] Also in Venkataswamy v Radhakrishna the Madras High Court held that proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon any one asserting that any item of the property is joint to establish the fact. Unless it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden does not shift to the party alleging that

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39. (1925) 85 I.C. 296, [1925] Lah. 122.

40. Tajmulali v Jaga Mohan Das (1917) 38 I.C. 96.

it is his self-acquired property.[41] So also under the Dayabhaga system, where there is no distinction between self-acquired and ancestral property as regards a father's power of disposal as in the case of self-acquired property of the adopter under the Mitakshara, an adopted son does not seem to stand in a better position than a natural born son.

Express Contracts by Adopter for the benefit of Adoptee

The question may arise as to the position when there is an express contract by the adopter appointing the adopted son as the heir to the adopter's estate. In Gopee Mohun v Raja Raj Krishna,[42] a boy was adopted on an express stipulation that he would inherit the whole of the adopter's property but on the birth of a real son the adoptive father made a will giving him less than his legal share. The case was however, settled out of court. Referring to this case Sir F. Macnaghten observed that the opinion of the court was

> "that a man who had adopted a son was not at liberty, by his will, to cut off the adopted son from that proportion of the estate to which in virtue of adoption he was entitled by Hindu law";[42]

with which he agreed and added that "a boy who is taken for adoption ought to be considered as a purchaser".[43] But in Sri Raja Venkat Surya v The Courts of Wards[44] the P.C. were

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41. A.I.R. 1963 A.P. 476; also see Derrett: Introd. to Modern Hindu law (1963)para.549.

42. Cons. H.L. p. 228.

43. Cons. H.L. p. 230.

44. (1899) I.L.R. 22 Mad. 383, 390 (P.C.). See also Surendra v Kala (1907) 12 Cal. W.N. 668.

of the opinion that the argument that the adopted son must be considered to be a purchaser for valuable consideration is opposed to all authorities on the subject of adoption and held that a Hindu adopting a son does not thereby deprive himself of any power that he may have to dispose of his property by will. There is no implied contract on the part of the adopter, in consideration of the gift of his son by the natural father, not to make a will. According to the Hindu authorities also the adopted son is in the same position as a son born. They all treat it as a case of gift of the son by the natural father, which is assented to and received by the adopter, and there is not a trace of any restriction on the adopter's power more extensive than in the case of a natural son. The argument of implied contract not to make a will in consideration of being given the son in adoption by the natural father is without any authority to support it. If it were a right, the adopted son would be in a higher position than the natural son. In this case, the adopter had made an express agreement constituting the boy as the heir to his estate, but their Lordships treated it as meaning that he had given him the same rights as a natural son would have. Also coparcenary between the Raja and the adopted son was not admitted but the contrary was held. If the Raja had power to alienate he might do it by will, and the title by will would have priority to title, by succession. Commenting on this case G.S. Sastri[45] remarks that as a result of this decision it has become absolutely necessary for the natural parents to require the adopter to settle his property on the boy before making the gift of their son for fear of

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45. G.S. Sastri 'Hindu Law' 1936 edn., p. 274. Also refer to the discussion on Pp. 119 et seq. of this thesis.

disinherison by him. I am unable to agree with the decision in this case for reasons mentioned subsequently at page 127.

Following the Privy Council decision the Calcutta High Court have held that in Hindu adoption there is no implied contract with the natural father that in consideration of the gift of his son the adopter will not make a will.[46] In an earlier case, however, it was held that although the adopted son was not a party to an express agreement, he could insist on the performance of the contract, by which each widow bound herself to the other to deal with the estate in his favour.[47] In this case[47] a testator bequeathed all his property to a family thakur; and to secure the debsheba, directed that his two widows should each adopt a son to him, the sons to become shebaits of the property dedicated, of which the widows, during the sons' minority, were to have control. The widows, having purported to adopt according to the will, then bound themselves by an ikrarnama, each to the other, to bring up the sons as their mothers and guardians; and, after payment of the expenses for the debsheba, to divide the surplus income into two equal shares, making accumulations, which should be handed over by each to the son adopted by her on his attaining majority.

In a suit by the son purported to have been adopted by the elder widow, who was then dead, against the younger widow, and the son purported to have been adopted by her, in effect for the administration of the testator's estate, with a claim for relief based on acts of the widows, including the ikrarnama

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46. Surendra v. Kala (1907) 12 O.W.N. 668.
47. Surendra Keshub v. Doorgasoondery, (1892) I.L.R. 19 Cal. 513, 536 (P.C.).

executed by them, it was held first that the adoption being invalid the plaintiff could take nothing under the will; secondly that, by the law of inheritance the widows, as heirs, took the office of shebait, and became entitled to the beneficial interest in the surplus income for their estate for life; so that each of them could contract to bind her own interest, and thirdly that there was no trust imposed upon the surviving widow independently of the contract which she had made, but that the ikrarnama taken as part of the series of acts, gave to the boys, so far as the widows' interests extended, the same benefit that they would have taken had they been heirs; and although they were not, and could not have been at their age parties to the ikrarnama, yet that they could insist on the performance of the contract, by which each widow bound herself to the other to deal with the estate in their favour. Fourthly, that each boy was entitled on attaining majority to half of the surplus income during the life of the surviving widow, and to the accumulations thereon; and accounts were accordingly directed against her.

In Rani Chhatra Kumari Devi v. Prince Mohan Bikram Shah,[48] a case arising from an appeal from a decision of the Patna High Court, the Privy Council held obiter that if the adoptive father contracts with the natural father that in consideration of the son being given in adoption, he would devise to the adopted son all his properties absolutely and

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48. (1931) 35 C.W.N. 953, 961 (P.C.) on appeal from (1931) Pat. 114. (1931) 10 Pat. 851 P.C.; (1931) 35 C.W.N. 953, 961 (P.C.) on appeal from (1931) Pat. 114. Kapur: Law of Adoption in India and Burma (1933 edn.) p. 431.

he leaves a will under which no properties are left to the adopted son but they are left to the testator's widow; the adopted son could not be the owner of the properties merely by virtue of the contract but if his natural father had obtained a decree against the adoptive father's estate, the adopted son might conceivably have had some remedy against the natural father, but he could hardly have claimed the properties

from the adoptive father. The following were the ratio(nes) decidendi of the case (i) The contract does not make the adopted son the owner of the properties and he cannot sue the widow as such. (ii) The natural father or his legal representative after his death, can in such a case obtain compensation for the breach of the contract and can perhaps even obtain specific performance, he would certainly obtain compensation for the breach.[49] (iii) If the natural father were to obtain a decree against the estate of the adoptive father, the adopted son may have a remedy against the natural father but he would hardly have a claim against the properties from the widow. (iv) The widow may be regarded as a trustee for the adopted son, but only so long as the contract remains enforceable.[50] (v) Even assuming that the properties were impressed with a continuing trust, the ownership of the properties would be in the trustee against whom the adopted son would have the right to call upon her to convey to him, such right being enforceable up to 6 years under Art. 120 of the Limitation Act. The adopted son cannot bring a possessory suit as an owner after this period has expired. (vi) The properties vested in the widow cannot be regarded as vested for the specific purpose of being made over to the adopted son and so section 10 of the Limitation Act would not apply.[51]

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49. Synge v Synge [1894] 1 Q.B. 466; Robinson v Ommanney 23 Ch. Div. 285; and In re Parkin -1892] 3 Ch. 510 (relied on). Kapur: Law of Adoption, p. 431.

50. Dufour v Pereira (1 Dick 419; 2 Harq. Jui, Arg. 304 (1769); Gray v Perpetual Trustee Coy. (1928) A.C. 391; In Re Hagger [1930] 2 Ch. 190; and Central Trust Coy. v Snider [1916] 1 A.C. 266 referred to.

51. Khew Sim Tek v Chuah Hooi (1921) L.R. 49 I.A. 37, 43.

(vii) The Indian law does not recognise legal an equitable estates.[52] In India a trustee is owner of the trust property[53] The question of "Contracts for the benefit of Third Persons" has been discussed at length in a learned article in the Madras Law Journal.[54] The author also compares the English and Indian law on the subject. The English rule on the subject was enunciated in 1861 by Wightman J. in Tweedle v. Atkinson[55] who said:

> "... it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit".

This principle was affirmed by the House of Lords in Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd.[56] but this rule has been criticised in a number of recent cases,[57] and in 1937, in its sixth Interim Report the Law Revision Committee stated:-

> "Where a contract by its express terms purports to confer a benefit directly on a third party, the third party shall be entitled to enforce the provision in his own name, provided that the promisor shall be entitled to raise against the third party any defence that would have been valid against the promisor ..."

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52. Tagore v. Tagore (1872) L.R.I.A. Supp. 47, 71; Webb v. Macpherson (1909) I.L.R. 31 Cal. 57, 721; L.R. 30 I.A. 238, 245.
53. Opinion of Sir George Lowndes in the case of Raja Bhupendra Narayan v. Rajeswar Prosad (1931) 35 C.W.N. 870.
54. Contracts for the Benefit of Third Persons by R.C. Jaiswal, 1968 2 M.L.J., 73-82.
55. 124 R.R. 610.
56. L.R. (1915) A.C. 857.
57. Smith and Snipes Hall Farm Ltd. v. River, Douglass Catchment Board (1949) K.B. 500 and Drive Yourself Hire Co., (London) Ltd. v. Strutt, (1954) 1 Q.B. 250; Beswick v. Beswick (1966) 3 All. E.R. 1. Also see article by Prof. Corbin: Contracts for the benefit of third persons, (1930) 46 L.Q.R. 12 and also (1933) 49 L.Q.R. 474. Also see article by A. Shankar Reddy: A Stranger's right to sue on a contract 1968 26 An.W.R, J. 13.

In India there has been great divergence of opinion in the Courts as to how far a stranger to a contract can enforce it. The rule of Tweddle v Atkinson[55] was applied by the Privy Council in Jamuna Das v Ram Autar[58] and by Rankin C.J. in Krishna Lal v Promila Bala[59]. In Khwaja Muhammad Khan v Hussaini Begum[60] there is another line of thinking wherein their Lordships of the Privy Council observed:

> "... In India and among communities circumstanced as the Mahomedans, among whom marriages are contracted for minors by parents and guardians it might occasion serious injustice if the common law doctrine was applied to agreements or arrangements entered into in connection with such contracts".

This statement has been taken by the Madras[61] and Calcutta High Courts[62] as laying down the rule that the Indian Courts are not bound by the rule in Tweddle v Atkinson.[55] The Calcutta High Court observed:[62]

> "Nor is there anything in the Indian Contract Act, which prevents the recognition of a right in a third party to enforce a contract made by others, which contains a provision for his benefit.
>
> In the United States of North America, this is frankly recognised.....
>
> And same is the Scots Law".

The Courts in India have introduced a great number of exceptions in which the rule of privity of contract does not prevent a person from enforcing a contract which has been

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58. (1911) 21 M.L.J. 1158: (1911) 39 I.A. 7.

59. A.I.R. 1928 Cal. 518.

60. (1910) 37 I.A. 152: 20 M.L.J. 614.

61. Muniswami Naicken v Vedachala Naicken and another, A.I.R. 1928 Mad. 23.

62. K. Datta v M. Panda I.L.R. (1932) 61 Cal. 841, as per Lord Williams, J. at p. 857.

made for his benefit but without his being a party to it. Some of the most commonly known exemptions are in cases of trust or charge, marriage settlement, Partition or other family arrangements and acknowledgement or Estoppel. The Privy Council decision in Ehwaja Muhammad Khan v. Hussaini Begum[60] referred to above is illustrative of this principle. In Rana Umanath Baksh Singh v. Jang Bahadur,[63] one U was appointed by his father as his successor and was put in possession of his entire estate. In consideration thereof, U agreed with his father to pay a certain sum of money and a village to J, an illegitimate son of his father, on his attaining majority. It was held by the Privy Council that in the circumstances mentioned above a trust was created in favour of J for the specified amount and the village. Hence he was entitled to maintain the suit. Also it has been held that a constructive trust results in favour of an addressee of insured articles and he can claim compensation from the Central Government on non-delivery of the insured articles.[64]

Where an agreement is made in connection with marriage, partition or other family arrangement and a provision is made for the benefit of a person he may take advantage of that agreement although he is no party to it. In Rose Fernandes v. Joseph Gonsalves[65], where the girl's father entered into an agreement for her marriage with the defendant, it was

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63. A.I.R. 1938 P.C. 245: (1937) 12 Luck. 639.

64. Chandari Amirullah v. Central Government. (1959) All. L.J. 271 and Postmaster-General v. Ram Kripal Sahu and another, A.I.R. 1955 Pat. 442. See also article by K.D. Bhate: Third Party's Claim and some Problems (1963) 65 Bom. L.R. (J) 65, wherein the author expresses the view that there is no privity of contract between the third party and the insured.

65. I.L.R. (1924) 48 Bom. 673; see also Daropti v Jaspat Rai (1905) Punj. Reports 171.

held that the girl after attaining majority can sue the defendant for damages for breach of promise of marriage and the defendant cannot take the plea that she was not a party to the agreement. It has been held in many cases[66] that

> "a person though not a party to a contract can sue to enforce the terms thereof if it be a family settlement by which some provision is made for him or her as a member of the family, for example, for maintenance or marriage, though the same is not made a charge upon the family properties".

Also where by the terms of a contract a party is required to make a payment to a third person and he acknowledges it to that third person, a binding obligation is thereby incurred towards him. This acknowledgment may be express or implied. Such cases are also treated as exceptions to the general rule of privity. In Devaraja Urs v Ram Krishniah,[67] A sold his house to B under a registered sale deed and left a part of the sale-price in his hands desiring him to pay this amount to C, his creditor. Subsequently B made part payments to C informing him that they were out of the sale price left with him and that the balance would be remitted immediately. B, however, failed to remit the balance and C sued him for the same. The suit was held to be maintainable.

> "Though originally there was no privity of contract between B and C, B having subsequently acknowledged his liability, C was entitled to sue him for recovery of the amount".

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66. Sundarraja Aiyangar v Lakchmiammal, I.L.R. (1915) 38 Mad. 788, Rakhma Bai v Govind Moreshwar (1904) 6 Bom. L.R. 421; Mst. Dan Kuer v Mst. Sarla Devi, A.I.R. 1947 P.C. 8; Shuppu Ammal v Subramaniayan (1910) I.L.R. 33 Mad. 238.

67. A.I.R. 1952 Mys. 109. Also see Debnarayan Dutt v Chunnilal Ghose, I.L.R. (1913) 41 Cal. 137.

It would be seen that the privity rule often causes injustice and hardship as it results in a multiplicity of suits whereas the object of the courts should be to do complete justice in one suit. The author of this article rightly observes that in India, there are no reasons - "legal, historical or otherwise" - why we should follow the English rule which is based upon the now abolished common law forms of action and consequently which is under attack in its country of origin itself.[68]

The doctrine of rights (if any) of third party under a contract was considered in Beswick v. Beswick[68a]. In this case, in March, 1962, the deceased, a coal merchant, by agreement in writing under the hands of the deceased and the appellant who undertook to pay him £6. 10s. weekly for the remainder of his life and in the event of his death to pay his widow, the respondent an annuity of £5 weekly. The deceased died intestate in November, 1963. In 1964 the respondent took out letters of Administration to his estate. The Appellant made one payment of £5 to the respondent and refused to make any further payment. The respondent, as administratrix of her husband's estate and in her personal capacity claimed payment of arrears of the annuity and an order for specific performance of the continuing obligation to pay the annuity.

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68. Denning L.J. is the Chief Critique of the doctrine. See his Lordship's observations in Drive Yourself Hire Co. London Ltd. v. Strutt (1954) 1 Q.B. 250 at pp. 273-274; Smith and Snippers Hall Farm Ltd. v. River Douglass Catchment Board (1949) 2 K.B. 500 at p. 514 and Beswick v. Beswick (1966) 3 All. E.R. 1 at p. 9. See also a note by E.J.P. on Privity of Contract in (1954) 70 L.Q.R. 467 and Prof. Corbin, Contracts for the benefit of the Third Persons (1930) 46 L.Q. R. 12.

68a. (1967) 2 All. E.R. 1197 (H.L.).

It was held that the respondent as administratrix of the estate of her husband, a contracting party, was entitled to enforce the agreement and to do so by way of an order for specific performance in her own personal favour, and that remedy was available to her suing as administratrix.

The right of a third party to sue on a contract was also considered by a full bench of the Madras High Court in Subbu Chetti v. Arunachalam Chettiar.[68b] In this case their Lordships observed that where on a contract between A and B, B agrees to pay a sum of money to C and no more circumstances appear, C being a stranger to the contract, cannot sue B for the money though all the parties to the contract are parties to the suit. This is the general rule, though some exceptions to the rule arise under the following circumstances, e.g.
(a) where B afterwards agrees with C to pay him direct or becomes estopped from denying his liability to pay him personally,
(b) where the contract between A and B creates a trust in favour of C,
(c) where the contract charges the money to be paid out of some immovable property or
(d) where it is due to C under a marriage settlement, partition or other family arrangement.

In Tarachand v. Syed Abdul Razak[68c], where an advocate acted as legal adviser of the arbitrator and the parties agreed in the award to pay certain amounts to the advocate as his fees and the latter sued them for the same it was held that the advocate could not succeed on the principle of trust, agency, estoppel or privity of contract.

68b. (1929) I.L.R. 53 Mad. 270 F.B.

68c. A.I.R. 1939 Sind 125.

In Kshirodebihari v. Mangobinda,[68d] however, it was held that a Zemindar can sue upon a contract made between his mokarraridar and darmokarraridar, whereby the latter undertook to pay the mokarraridar's rent direct to the Zemindar; and the Zemindar can obtain a decree for the rent direct against the darmokarraridar. Their Lordships observed that there is nothing in the Indian Contract Act, which prevents the recognition of a right in a third party to enforce a contract made by others, which contains a provision for his benefit; and the definition of consideration in Section 2(d) is wider than in English law. Their Lordships referred to Khwaja Muhammad Khan v. Hussaini Begum[60] and observed that there is ample authority for saying that the administration of the law of contract in India is not affected by the doctrine laid down in Tweedle v. Atkinson[55], that only a person, who is a party to the contract can sue upon it. In India the aim is to do complete justice in one suit. In the mofussil courts of India the rights of parties are to be determined according to general principles of justice, equity and good conscience, without any distinction, as in England, between that partial justice, which was administered in Courts of law and the more full and complete justice, for which it was frequently necessary to seek the assistance of a court of equity.

The expansion of the equitable concept of a trust to enable a third party to enforce a contract made between others is an instance of the growth of law by means of fiction. Their Lordships observed that whatever may have been the

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68d. (1933) I.L.R. 61 Cal. 841; Subbu Chetti v. Arunachalam Chettiar (see note 68b) not followed and dissented from.

necessity in England, whether historical, procedural or otherwise for making use of such fictions, there seemed to be no similar necessity for importing these anomalies into India.

In a recent case M.C. Chacko v. The State Bank of Travancore[68e] the Supreme Court has held that under S.2(d) of the Indian Contract Act (1822) only a person who is a party to a contract can sue on it and the exceptions to this rule were explained. A donor's creditor does not have a right to sue.

In this case The Highland Bank, Kottayam of which the appellant M.C. Chacko was the manager had an overdraft account with the Kottayam Bank. K.C. Chacko, father of the appellant, had executed from time to time letters of guarantee in favour of the Kottayam Bank agreeing to pay the amounts due by the Highland Bank under the overdraft agreement. By the last letter of guarantee dated 22nd January, 1953, K.C. Chacko agreed to hold himself liable for the amounts due by the Highland Bank to the Kottayam Bank, on the overdraft arrangement subject to a limit of Rs. 20,000/-. The Kottayam Bank Ltd., sued in the Lower Court for the amount due in the account, which case later came up before the Supreme Court for decision. Their Lordships of the Supreme Court held that the Kottayam Bank not being a party to the deed was not bound by the covenants in the deed, nor could it enforce the Covenants. Their Lordships observed that it was settled law that a person not a party to the contract cannot, subject to certain well

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68e. (1969) 2 S.C.W.R. 241.

recognised exceptions, enforce the terms of the contract; the recognised exceptions were that beneficiaries under the terms of the contract or where the contract was part of the family arrangement may enforce the Covenant. Their Lordships referred to Dunlop Pneumatic and Tyre Co. v. Selfridge & Co[56] and Khwaja Muhammed Khan v. Hussaini Begum[60] which have been discussed above, and also to the case of Jamuna Das v. Ram Autar[58] wherein the Judicial Committee pointed out that the purchaser's contract to pay off a mortgage debt could not be enforced by the mortgagee who was not a party to the contract.

It must be taken as well settled, observed their Lordships, that except in the case of a beneficiary under a trust created by a contract or in the case of a family arrangement no right may be enforced by a person who is not a party to the contract. The basis of the rule giving the beneficiary the right to enforce the contract is that though he is not a party to the contract his rights are equitable and not contractual.

In the case of the adopted sons also, on equitable considerations I think that ante-adoption agreements for the benefit of the minor adopted sons should be made enforceable at law. For psychologically and otherwise the adopted son is not in the same advantageous position as a natural son and needs protection from the law.

Family arrangements:

It will not be out of place here to discuss briefly the subject of family arrangements in India.

The subject has been dealt with by Prof. Derrett in his instructive article in Anderson's Family Law in Asia and Africa.[69] The learned writer observes that the special feature

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69. Published in 1968, George Allen & Unwin Ltd., 1968. Also see Article by J.D.M. Derrett: Family Arrangements (1968) 70 Bom. L.R. (J). 1.

of the family arrangement is the right it may create in those who are not parties ot it. The English assumption that "it is right and proper for every person whose legal rights are debated to take a share in all negotiations affecting them, either personally or through his agent, by no means operated in all developing societies. Unlike normal contracts, where a contract is intended to secure a benefit to a third party as a beneficiary under a family arrangment he may sue in his own name to enforce it.[70] The family arrangement enables parties to dispose in advance of such estate as would fall to them or any of them upon the death of a person now living. Such instruments secure the peace, happiness and welfare of families and litigation is avoided. Derrett observes that the family arrangement exists in principle as much to rearrange property rights about which the parties may have no clear notion, as to compromise a doubtful claim. The Privy Council and the Courts in India have never acknowledged openly that the family arrangement in Asia differed from that in England and the rules which emerge bear a close resemblance to those found in Halsbury's Laws of England. The Supreme Court of India has in recent years, made pronouncements on them.[71]

Mentioning the advantages of the Institution Derrett[72]

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70. Khwaja Muhammad v Husaini Begum (1910) I.R. 37 I.A. 1952, 158-9; Dan Kuer v Sarla Devi (1946) 73 I.A. 208, Shangmugan v Annamalai, A.I.R. 1935 Mad. 141, 143-4.

71. Sahu Madhó Das v Pandit Mukund Ram (1955); Potti Lakshmi v P. Krishnavenamma (1965); Ram Charan-Das v Girja Nandini (1966); Tek-Bahadur v Devi Singh & Maturi Pullaiah v M. Narasimham (1966) - see below.

72. At p. 161.

observes that the main object was to vary the title to property, including expectancies, in a manner conducive to the best interests of the family and thus avoiding the waste of the family's estate by improvident and avoidable litigation. In course of time a family arrangement became a much larger institution than merely a class of compromise and could bind parties including minors[73] and persons yet to be born,[74] so as to avoid a situation fraught with the making of a dispute. In Sahu Madho Das v Pandit Mukund Ram the widow of the last male holder of the estate made a gift of certain properties of her limited estate to each of her three daughters absolutely and other properties to each of her four grandsons. The donees themselves tried to persuade others, including the persons to whom they ultimately sold their shares, that they had taken the properties absolutely. Thus from a long course of dealing, it was held, that the arrangement could be imputed.[75] So also in Lakshmi Chand v Mst. Anandi, an invalid alienation was acted upon by the testator's relatives, including those entitled under the personal law by survivorship from the deceased and their Lordships of the Privy Council held it as good evidence of a family arrangement contemporaneously made and acted upon by all parties.[76] Derrett further observes that particularly where families are ignorant of the new law

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73. Keramatulla v Keamatulla (1915) 23 I.C. 118; Dwarka v Krishnan (1921) I.L.R. 2 Lah. 114.

74. Re New (1901) 2 Ch. 534 C.A.; Chabildas v Ramdas (1909) 11 Bom. L.R. 606.

75. (1955) 18 S.C.J. 417, 419 following Clifton v Cockburn (1835) 3 My. & K 76 and Williams v Williams (1867) L.R. 2 Ch. App. 294.

76. (1926) L.R. 53 I.A. 123.

and successive deaths occur the only way to avert desperate chaos may be to impute to the parties a family arrangement, although such arrangement cannot circumvent the general law by attempting to provide for the future devolution of the properties once they have vested absolutely.[77] There are also other useful features of a family arrangement. No conveyance is needed and the agreement need not be in writing, and if intended to be oral need not be registered.[78] It may be proved by oral evidence. Also there is no requirement that the parties should emerge in approximate parity so far as the benefits are concerned. A further advantage is that such an arrangement will bind transferees who have or ought to have notice of it, whether they are voluntary alienees or have taken under a compulsory transfer from the parties or from any of them.[79]

In order that the family arrangements may be valid and binding upon all parties, certain requirements must be met, which are listed by Derrett as follows:-

1. The parties must be 'interested' in the property concerned. There must be an antecedent title of some sort in the parties (even to expectancy)[80] Persons about to enter the family by marriage, and their eventual issue, may well take a benefit under the agreement, although strictly they were strangers at

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77. Purna Skashi v Kalidhan (1911) I.L.R. 38 Cal. 603 (P.C.).

78. Tek Bahddur v Devi Singh A.I.R. 1966 S.C. 292, 294, 295.

79. Raya Shenoi v Kesava Mallan (1943) 34 Cochin L.R. 465 (F.B.).

80. Ram Pratap v Indrajit A.I.R. 1950 All. 320.

the time the agreement was entered into.[81] Also where the parties have interests in the property such as a right of maintenance as in the case of an illegitimate son or a reversionary right or a moral right as in the case of an invalidly adopted son. Where however the claimants to the property have no interests at law and no moral claim, but only claim by virtue of some act on the part of one or more members of the family, the tendency of the decision is to deny such settlement the status of a family arrangement and to such settlements the ordinary law relating to dispositions of property ~~family~~ ought to apply. However, a strictly limited exception has been recognised, where, along with a valid family arrangement, disputes with strangers are compromised, provided the disputes are intimately connected with members of the family, in which case the arrangement is not invalid for embracing grants to strangers.[82]

2. The arrangement must be intended to settle a bona fide claim:- In Ram Niranjan Singh v Prayag Singh[83] the Calcutta High Court held that though a dispute between two brothers was founded on a mistake of law the compromise would bind both parties. A full bench of the Allahabad High Court have held that 'a family arrangement at bottom is nothing but an agreement and the essential thing is that it should be for consideration. While the object of the arrangement was to maintain good relations, to preserve the family property, to convert the

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81. Surendra Keshav v Doorgasundery (1891) L.R. 19 I.A. 108.

82. Sultan Ahmad v Sirajul Haque I.L.R. (1938) All. 125.

83. (1881) I.L.R. 8 Cal. 138, 142, 143.

expectancy of reversioners into a certainty, it was a sufficient consideration in law to uphold the arrangement'.[84] In Rangasami Gownden v Nachiappa Gownden the Privy Council have observed that provided the parties are related to one another in some way andhave even a semblance of a claim, even on the ground of, say, affection, the arrangement may be effective.[85]

The test eventually developed in India was that, though the claims might be ill-founded, a conflict must be present which the parties intended to fight out[86] but recently the Supreme Court has held that a conflict is not essential.[87] In M. Pullaiah v M. Narasimham[87] the arrangement had not been entered into in order to settle a claim to property, but to prevent losses to the family as a whole which might have accrued had the younger brother exercised his undoubted right to a separation. So also the arrangement mzy well be sustained if the mistake is one of fact and not of law.[88] But a purported family arrangement which is really a cloak for a transfer of property to strangers will be struck down.[89]

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84. Mst. Dasodia v Gangaprasad I.L.R. (1943) All. 411, A.I.R. 1943 All. 101 (F.B.) followed in Laxmi Narain v Banshi Lal A.I.R. 1965 All. 522.

85. (1918) I.R. 46 I.A. 72, followed in Ram Charan Das v Girja Nandini (1966) 1 S.C.J. 61, 67; A.I.R. 1966 S.C. 323.

86. Pokhar Singh v Dulari (1930) I.L.R. 52 All. 716; Sidh Gopal v Bihari Lal (1927) I.L.R. 50 All. 284; Jang Bahadur v Rana Uma Nath (1937) I.L.R. 12 Luck. 639; Buchibai v Nagpur University I.L.R. (1946) Nag. 433.

87. M. Pullaiah v M. Narasimham A.I.R. 1966 S.C. 1836.

88. Ram Niranjan Singh v Prayag Singh (1881) I.L.R. 8 Cal. 138, 140.

89. Mst. Gangubai v Punau Rajwa Tek A.I.R. 1956 Nag. 261 following Miles v N.Z. Alford Estate Co. (1886) 32 Ch.D. 266, 291.

3. The arrangement must finally settle the differences between the parties, and must be acted upon by them. A fair test whether the parties intended to put an end to their disputes is whether they acted upon it. As held in Potti Lakshmi v P. Krishnavenamma,[90] an arrangement which is not acted upon cannot be enforced after an interval within which it would, if genuine, have been put into effect.

4. The interests of non-consenting members must be properly consulted. Those who propound an arrangement should be able to satisfy the conscience of the court that the non participating members' interests were fully and fairly consulted, and that advantage was not taken of their ignorance,[91] and that the share or value which they took under the arrangement was equitable in the then circumstances.

Family arrangements are generally favoured by courts, who will not lightly reopen matters which the settlement has purported to close. But where the arrangement was procured through fraud or undue influence[92] or minors interests were unfairly disregarded, the arrangement may be upset.[93]

In conclusion Derrett says that for the validity of a family arrangement there is no need to pretend that a dispute exists where none ever did, the members living in perfect amity. He observes that as in the case of English law, the moral

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90. A.I.R. 1965 S.C. 825, 828 Col. 2.

91. Billage v Southee (1852) 9 Hare 534, 540.

92. T. Narayana Bhatta v Narasimba, A.I.R. 1965 Ker. 189; Gopal Das v Dhanraj, A.I.R. 1945 Sind. 11.

93. Bishambhar Nath Kapoor v Amar Nath, A.I.R. 1937 P.C. 105. (no evidence of unfairness).

obligations binding on a family should be a sufficient consideration to found a family arrangement. The same principles could well apply to ante-adoption agreements made for the benefit of the minor adopted son.

Adoption of an adult - agreement with adult

The Bombay High Court has held in Pandurang v Narmadabai[94] that an adopted son who is of full age deliberately making arrangement as to the extent of his interest in the property of his adoptive father at the time of his adoption is bound by it. Also in Mst. Asa Bai v Prabhulal it has been held that it is not open to the adopted son to renounce his status as such and to return to his family of birth though he may renounce his right of inheritance in the adoptive family in which case the inheritance would go to the next heir.[95]

When the adoption is by the widow

In Krishnamurthi v Krishnamurthi the Privy Council have held that an ante-adoption agreement entered into between the natural father of the adopted son and the widow who is going to adopt his son, by which a reasonable provision for maintenance of the widow is made in her favour absolutely is valid and binding upon the adopted son. On principle there

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94. A.I.R. 1932 Bom. 571, 56 Bom. 395 following 40 Bom. 668 (Kashibai v Tatya Ramasami's case (1879) I.L.R. 2 Mad. 91 (P.C.). A.I.R. 1927 P.C. 139 Expl. and A.I.R. 1930 Bom. 58 (Shivram v Ram Krishna) Dist.

95. A.I.R. 1960 Raj. 304.

is nothing wrong in the widow taking a reasonable portion of the estate absolutely for her maintenance under such an agreement.[96] The Andhra Pradesh High Court have held that an ante-adoption agreement should not extend to anything other than the regulation of the rights of the widow in the property and the sanction to it is based on custom. An arrangement cutting down the rights of the adopted son to a life estate is not valid.[97] In M. Purnananda v. C. Purnanandam where, as a result of an agreement the adopting widow took one-tenth of the estate absolutely for her maintenance, the dattaka son taking the remainder, was held to be fair and reasonable.[98]

In Punithavalli v. Ramalingam[99], the Supreme Court has held, reversing the Madras High Court decision in Ramalingam v. Punithavalli[100], that the full ownership conferred on a Hindu female under Section 14(1) of the Hindu Succession Act (1956) is not defeasible by the adoption made by her to her deceased husband after the Act came into force. These cases are discussed at pages 344 to 345 which may be referred to.

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96. A.I.R. 1927 P.C. 139; 54 I.A. 248.

97. P. Venkatarao v. P. Venkateswara Rao (1955) An. W.R. 783

98. A.I.R. 1961 An. P. 435.

99. A.I.R. 1970 S.C. 1730, see also Kavuluru v. K K. Purnshothamma 1971 1 An.W.R. 134 where a similar view is held (see pp. 346-347.

100. A.I.R. 1964 Mad. 320.

Rights in separate property of adoptive father.

The Privy Council held in Kalyan Sundaram v. Karuppa that an alienation by way of gift by the adoptive father of his separate property prior to the adoption is binding on the adopted son.[101]

It has also been held that the will of self-acquired property of a Hindu testator is not revoked by the birth of a posthumous son or by a subsequent adoption of a son by him.[102] In Subba Reddi v. Doraiswami [102] their Lordships of the Madras High Court remarked that

> "the legislators having dealt with the question of revocation of wills and having enacted that no wills shall be revoked except in the manner provided in the Act, it is not open to courts to hold that such wills may be otherwise revoked".

Also it appears that even when the property is ancestral subsequent adoption will not revoke a will, for the will speaks at death and the property is carried away before the adoption

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101. (1929) L.R. 54 I.A. 89; (1927) P.C. 42.

102. Vinayak v. Govindrao (1869) 6 Bom. H.C.R. 224, 229; Subba Reddi v. Doraisami (1907) I.L.R. 30 Mad. 369.

takes place.[103]

Under Punjab Custom

Under the Punjab customary law an appointed heir has practically the same rights as a son adopted under the Hindu law. There are minor distinctions e.g. as regards collateral succession[104] and another difference is that if the appointed heir dies sonless and leaves no widow, the inherited estate from the appointer passes to his own natural heirs if the appointer had absolute power of disposition but passes to male collaterals of appointer's family of the appointer had only a restricted power over the property.[105] Further if a natural son is born after the appointment of an heir, the appointed heir succeeds equally with such subsequently born natural son.[106] This shows that the position of an appointed heir is for most purposes that of a son or an adopted son. In Waryam Singh v Ishar Singh,[106] a case under the Punjab Customary law it was held that a declaratory decree obtained by the reversioners of the adoptive father ensures for the benefit of an appointed son, appointed after the decree just as in the case of an after-born son with whom in fact he would share. Also as the owner had died before the Punjab Act I of

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103. See Derrett: Introduction to Modern Hindu Law, p. 127; Krishnamurthi v Krishnamurthi, A.I.R. 1927 P.C., 139, 145a; D. Lakshminarasimham v G. Rajeswari, A.I.R. 1955 And. 278; also Ramalingam v Punithavalli, A.I.R. 1964 Mad. 320 and [1968] 2 An. W.R. 51.

104 See Pages 214 ff.

105. Para. 55 of Rattigan's Digest i.e. according as it is self acquired or ancestral property.

106. [1932] I.L.R. 13 Lah. 589. See also Mahomed Din v Fatteh Mahomed (1906) P.R. No. 24 p. 90.

1920 came into force that Act has no application to rights accruing before the Act came into operation, as nothing contained therein could affect rights which had already accrued upon the owner's death.[107]

Position under the English law.

The effect of provisions contained in Section 13(1) of the Adoption Act, 1958 as regards custody, maintenance and education of the adopted child have already been dealt with at p.89 which may be referred to. Section 13(2) further adds that where a husband and wife are the adopters, then, in respect of the matters referred to in the last paragraph and for the purpose of the jurisdiction of any court to make orders as to the custody and maintenance of and right of access to children, they stand to each other and to the adopted child in the same relation as they would have stood if they had been the lawful father and mother of the adopted child and the child stands to them in the same relation as to a lawful father and mother. This section, read with sections 4 and 5 of the Guardianship of Infants Act, 1925, provides that not only may an adopter appoint a testamentary guardian of the child to act after the adopter's death but the survivor of a husband and wife who jointly adopt an infant becomes its statutory

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107. Also see pages 86 et seq and 214 to 224 for the effects of adoption under customary law.

guardian.[108] And under the same Act an order for the maintenance of an adopted child may be made against its adopter. In re Skinner (an infant)[109] an adoption was made jointly by persons who were bigamously married. The man was later convicted of bigamy and sentenced to a term of imprisonment. After his release he left the woman who applied to the court for the child's custody which was awarded to her, together with a weekly maintenance from the man. On appeal by the man, Vaisey J. discharged the maintenance order made against the defendant as guardian of the adopted child on the ground that the adoption order was invalid. It could be valid only if the man and woman were validly married, since S. 1(3) of the Adoption of Children Act 1926 laid down that there could be no adoption of a child by more than one person unless there was a joint adoption by the husband and wife. His decision was, however, reversed by the Court of Appeal which stressed that it was the child's welfare that was the important point. "It is essentially a thing which alters the status of the infant who is the person primarily concerned".[110] The court held that the justices who ordered the maintenance had jurisdiction to make the maintenance order on the basis that the adoption order was valid.

> "Even if the adoption order could be challenged by appropriate process (as to which quaere) it was not competent for the justices to challenge it, and, therefore, they had jurisdiction to make the maintenance order on the basis that the

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108. S. 4 of the Guardianship of Infants Act 1925.

109. Re Skinner (an infant) [1948] 1 All. E.R. 917 (C.A.) reversing [1948] 1 All. E.R. 42.

110. Ibid., per Lord Greene at p. 918.

adoption order was valid".

Lord Green said[111]

> "If an order cannot be made without the presence of the infant properly represented by a guardian ad litem, that order, in my opinion, cannot be revoked or disregarded (if, indeed, there be a court competent to disregard it) in the absence of the infant".

The effect of intestacies, wills and settlements is dealt with in Section 16 of the Adoption Act, 1958 and is discussed at pages 95 to 97.

By Section 16(2) in any disposition of real or personal property made, whether by instrument inter vivos or by will (including codicil) after the date of an adoption order, any reference express or implied (a) to the child or children of the adopter shall be construed as, or as including, a reference to the adopted person; (b) to the child or children of the adopted person's natural parents or either of them shall be construed as not being, or as not including, a reference to the adopted person; (c) to a person related to the adopted person in any degree shall be construed as a reference to the person who would be related to him in that degree if he were the adopter's child born in lawful wedlock and not the child of any other person; unless in all cases the contrary intention appears. This provision would not appear to be sufficient to constitute the adopted person a "child of the marriage" of the adopter within the meaning of a marriage settlement or other disposition which turned on that wording. But an adopted child may still take on the

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111. (1948) 1 All. E.R. 917 at p. 920.

true construction of a particular disposition even though the Act does not apply.[112] This section is further discussed at pages 95 to 97 which may be referred to.

Before the Adoption Act 1950, only British children could be adopted but Section 16 of the 1950 Act (which corresponds to Section 19 of the Adoption Act 1958) permits the adoption of a child who is not a citizen of the United Kingdom and Colonies.

Where an adoption order is made in respect of a child who is not a citizen of the United Kingdom and Colonies, then, if the adopter, or in the case of a joint adoption the male adopter, is a citizen of the United Kingdom and Colonies, the child becomes a citizen of the United Kingdom and Colonies as from the date of the order. The references in this section include references to an order authorising an adoption under the Adoption of Children Act (Northern Ireland), 1950, or any enactment of the Parliament of Northern Ireland for the time being in force when a citizen of N. Ireland adopts a child in England, Wales or Scotland.

Also a child adopted by foreigners here does not change its nationality and a British child adopted by foreigners therefore stays British. Although a British child adopted by a foreigner does not lose British status, his position in his adoptive parents own country may be dubious, particularly in a

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112. In Re Gilpin (1954) Ch. 1.

country such as the Netherlands where there is no legal adoption and where a British adoption is not binding.

In Re Wilson, Grace v Lucas[113] the deceased and his first wife were British subjects domiciled in England. In 1939 they adopted P in Canada (Montreal) and on return to England did not apply for an adoption order in England. It was held that the capacity of an adopted child to succeed to the property was a matter to be determined, not by the law governing the adoption but by the law governing the succession, which, in the case of personal property, was the law of the deceased's domicile (i.e. England); an adoption order made under a foreign jurisdiction could not be brought either expressly or by implication within the provisions or principles of the Adoption Act 1950 (C. 26), S. 13(1) (which corresponds to S. 16(1) of the Adoption Act 1958) and therefore P was not entitled to participate in the property of the deceased as to which he died intestate. Commenting on this case R.H. Graveson observes[114] that in the case of recognition of foreign marriages, divorce decrees and legitimation etc. the English Courts had adopted a liberal attitude towards foreign institutions by no means identical in all respects with the English. He rightly suggests that a foreign adoption should be recognised if either (a) made or recognized by the Courts of the domicile of the adopter and adopted person or (b) made on a similar jurisdictional basis to the English which does not rest on the domicile of the adopted person. Graveson further remarks that one is justified in regarding Re Wilson[113] purely as a

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113. [1954] 1 All. E.R. 997.

114. R.H. Graveson "The Conflict of Laws" 6th edn. 1969 p. 406.

refusal to recognise a particular incident of a foreign status so far as that incident (capacity to succeed under an English intestacy) is sought to take effect in England. The case does not deny recognition generally to the status of the adopted child conferred by the law of the child's domicile. From the point of private international law the decision has only limited value.[115] The law was developed further in Re Marshall.[116] In this case the Court of Appeal propounded two principles which, observes Graveson, represent a little progress in the law and have at least the merit of certainty, which are in the words of Romer L.J.

(a) "that only those who are placed by adoption in a position, both as regards property rights and status, equivalent, or at all events substantially equivalent, to that of the natural children of the adopter can be treated as being within the scope of the testator's contemplation".[117]

(b) "that so far as adopted children are concerned their status and capacity to take under a gift to 'children' in an English will is (subject, of course, to British legislation) fixed once and for all at the testator's death and that subsequent legislation in the country of their domicile enlarging their rights is to be disregarded".[118]

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115. In Re Wilson [1954] Ch. 733 at p. 742 cf. Harman J. in Re Marshall decd. [1957] Ch. 263 at pp. 273-274.

116. [1957] Ch. 263, questioning Re Wilby [1956] 1 All. E.R. 27 which was overruled by Re Valentine's settlement [1965] Ch. 831, p. 407 Graveson's "The Conflict of Laws". For a discussion of Re Marshall's case refer Chapter V, p. 228. Re Wilby and Re Valentine's settlement are discussed below.

117. In Re Marshall [1957] Ch. 507 at p. 523, adopting the principle expressed in Re Fletcher [1949] Ch. 473, 479.

118. [1957] Ch. 507 at p. 525, following Lynch v Provisional Govt. of Paraguay (1871) L.R. 2 P. & M. 268.

This rule has now been embodied in statute and presumably applies equally to internal English cases as to the recognition of foreign adoptions. The Adoption Act 1958, S. 17(2) prescribes the death of the testator as the date for ascertainment of the adopter's children, a reference which includes adopted children unless a contrary intention appears.[119]

In Re Wilby[120] it was held that although an adoption in Burma would be recognised as valid in England for some purposes, it did not entitle the adoptive mother to succeed to the deceased's estate (the deceased was adopted in Burma and was later domiciled in England) on her death because the law of intestate succession applicable was the law of the deceased's domicile at the date of her death viz. English law and the adoption of the deceased in Burma was not an adoption to which the Adoption Act 1950 (C. 26) S. 13 (corresponding to S. 16 of the 1958 Act) applied; accordingly the application was dismissed. Under the Adoption Act 1950 (C. 26) S. 13 the property of a person adopted by an adoption order (i.e. an adoption order made by a court having jurisdiction under that Act) would devolve as if the adopted child were born in lawful wedlock. However, one must note with regret that the parties deceived the Court. There is no adoption of Christians in Burma and was none at the time. Adoption is confined to Hindus and Burmese Buddhists.[121] The view of Barnard J. in Re Wilby[120] that the court might deny all rights of succession to the

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119. Graveson's "The Conflict of Laws" 6th edn., p. 407.

120. [1956] 1 All. E.R. 27 (disapproved in Re Valentine's settlement (below)).

121. J.L. Kapur: The Law of Adoption in India and Burma, (1933) edn.).

children adopted in a foreign country on the dubious ground that Section 13 of the Adoption Act 1950 (corresponding to S.16 of the 1958 Act) applies to the British Islands only has been severely criticised[122] and has since been overruled in Re Valentine's settlement.[123] In this case one A.V. was resident and domiciled in Southern Rhodesia and the only child of his marriage was born in 1936. He and his wife adopted two children C and T by orders of the Children's Court of the Union of South Africa in 1939 and 1944 respectively. It was assumed that both adopted children were domiciled and resident in South Africa at the date of their adoption orders. No order for adoption was ever made in S. Rhodesia and it seemed from the expert evidence that the Courts in Southern Rhodesia would not recognise as valid in that country an adoption order made in a country in which the adopter was not resident and domiciled at the date of the order. By a settlement dated Feb.7,1946, the settled fund was to be held in trust, after the death of A.V., for all or any of his children who attained the age of twenty-one or being female married under that age. The settlement provided that the rights of persons claiming under it should be regulated by English law. A.V. died on July 5. 1962. It was held that the English Court would not recognise the adoption order of a court of a foreign country as conferring on the adopted infant the status of being a child of the adopting parents unless the adopting parents were

122. See Dicey and Morris: The Conflict of Laws (7th edn. by J.H.C. Morris with specialist editors) Harman J. in Re Marshall (1957) Ch. 263, 273-274; Mr. Justice Scarman (1962) 11 I.C.L.Q. 635, 636-637. English law and Foreign adoptions. Also an article by Z. Cowen: English Law and Foreign Adoptions, (1963) 12 Int. and Comp. L.Q.168-74 for information on trends in New Zealand, Australia and Canada.

123. (1965) Ch. 831, 844,846, 848 (C.A.); (1965) 2 All.

domiciled (or per Danckwerts, L.J., regarded by English Law as domiciled) in the foreign country at the time of the adoption order. In that case the adopting parents were not domiciled in South Africa at the time when the adoption orders were made, and accordingly neither adopted child could by English law take under the settlement as a child of the adopting father. Lord Denning M.R. stated (at p. 842) that

> "this new status of parent and child, in order to be recognised everywhere, must be validly created by the law of the domicile of the adopting parent. You do not look to the domicile of the child: for that has no separate domicile of its own. It takes its parents' domicile; you look to the [adopting] parents' domicile only. If you find that a legitimate relationship of parent and child has been validly created by the law of the [adopting] parents' domicile at the time the relationship is created, then the status so created should be universally recognised throughout the civilised world, provided always that there is nothing contrary to public policy in so recognising it".

Lord Denning M.R. also stated (at pp. 842, 843) a further requirement for the recognition in England of a foreign adoption, namely, that the child must be ordinarily resident in the foreign country; but Danckwerts L.J. was "not sure" on this point.[124] Dicey[125] observes that this rule is not limited to adoption orders made by a Court, but extends to any form of adoption e.g. by contract, deed, religious ceremony or special statute. English Courts, observes Dicey, are now willing to recognise foreign divorces obtained extra-judicially[126] and rightly remarks that there seems to be no reason why

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124. [1965] Ch. 831 at p. 846.

125. Dicey and Morris: Conflict of Laws, (8th edn. by J.H.C. Morris with specialist editors, at p.464.

126. See Dicey and Morris: Conflict of Laws 8th edn., by J.H.C. Morris with specialist editors at pp. 319-321.

they should not recognise foreign adoptions so effected.[127]

Salmon, L.J. in his dissenting opinion said at p. 852

> "I would recognise the validity of these adoption orders made by the South African Court, the laws of adoption in South Africa are very nearly exactly the same as our own, and the court should be slow to refuse recognition to an adoption order made by a foreign court which applies the same safeguards as we do and which undoubtedly had jurisdiction over the adopted child and his or her natural parents".

Commenting on this Dicey remarks that it is not easy to see how the question whether the foreign court applied the same safeguards as we do can be relevant when the question whether to recognise the foreign adoption arises a quarter of a century later, when the children are grown up, as happened in Re Valentine's settlement[123]. He further observes that since the English safeguards are probably the strictest in the world, not many foreign adoptions would be recognised if this test were to be applied. At p.472 Dicey mentions that Section 16 and 17 of the Adoption Act 1958 (as extended by the Adoption Act 1964) do not in terms apply to children adopted in a foreign country outside the British Islands and says that it does not follow, that such children cannot take as "children" of the adopter when the succession is governed by English domestic law.

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127. See Dicey and Morris (8th edn. by J.H.C. Morris etc.) p. 464 note 61 - Also Re Wilby 1956 p. 174 (adoption by deed in Burma), overruled in Re Valentine's settlement [1965] Ch. 831 (C.A.), but not on this point. Cf. Re Cherisky's Estate 288 N.Y. Supp. 266 (1936) (religious adoption in Russia); Re Johnson's Estate, 100 Cal. App. 2cl. 73, 223 p 2d. 105 (1950) (Contractual adop. in Norway), Martinez v. Gutierrez, 66 S.W. 2d. 678 (1933) (adop. by deed in Mexico), in all of which extra-judicial adoptions were recognised by American courts.

Assuming that the adoption is one which the English Court can recognise for purposes of succession he points out four possible solutions to this question, of whom the preferable view is that the court might treat the foreign-adopted child as though he had been adopted in England (notionally shifting the place, but not the date, of the adoption), and give him the same rights of succession, no more and no less, as a child adopted in England would have had. The authority of Lord Denning M.R. in Re Valentine's settlement[123] was in favour of this view, which was also consistent with all the Canadian decisions except one.[128] I am inclined to agree with the view of Lord Denning M.R.,[129] which seems to be most reasonable and which is as follows:

> "In my opinion, when English law recognises a foreign adoption order as conferring the status of a child, it does not give to the child all the self-same rights and benefits of succession as a natural-born child. It only gives the child the self-same rights and benefits as a child adopted in England by an English adoption order... The correct solution to this: the

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128. See Dicey: The Conflict of Laws, 8th edn., p. 473 n. 18. The exception is Re Mc Faden [1937] O.W.N. 404, which was however not followed in Kohut v Fedyna (1963) 45 D.L.R. (2d) 335. Adopted children were held entitled to succeed in Re Throssel (1910) 12 Western L.R. 683; Robertson v Ives (1913) 15 D.L.R. 122; Re McGillivray [1925] 3 D.L.R. 854; Re McAdam [1925] 4 D.L.R. 138; Re Ramsay Estate [1935] 2 W.W.R. 506; Re Milestone (1959) 15 D.L.R. (2d) 546, Re Jensen Estates (1963) 40 D.L.R. (2d) 469; and Kohut v Fedyna (1963) 45 D.L.R. (2d) 335. In Burnfiel v Burnfiel [1926] 2 D.L.R. 129, Re Donald [1929] 2 D.L.R. 244 and Re Skinner [1929] 4 D.L.R. 427, the testators died before adoption was introduced into the lex successionis (which was also the lex fori).

129. At p. 844.

> child is to be treated in English law just as if he had been adopted in England, no better and no worse".

However, the following opinion is expressed by Cheshire[130] who quotes the view of a distinguished advocate that the law of the common domicil is conclusive in this respect.

> "The problem is, in truth, that of the recognition of a status created by a foreign adoption. Thus the court, in any given case, must first determine the domicil of the parties at the time of adoption. If the adoption be according to that law, the effect of the act of adoption under the law must then be investigated. If it be to confer upon the person adopted substantially the status of a child born in lawful wedlock, English law, I suggest, may recognise such a person as such a child and English property law will apply to him accordingly. But if the foreign adoption does not have that effect according to its own law, there is no reason why it should be given any greater effect in England than by its own law".[131]

On the question where adopter and infant have different domiciles, Cheshire observes[132] that there is no agreement among foreign legal systems. In some the personal law of the infant governs; in others, the personal law of the adopter is preferred, but in many the doctrine of cumulation prevails by which the personal law of both parties must be satisfied.[133] The jurisdiction of the English Court, Cheshire points out, is based on the domicil of the adoptive parents,

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130. Cheshire: Private International law: 8th edition, p. 453.

131. The Hon. Mr. Justice Scarman (1962) 11 I.C.L.Q. 635, 638. For a decision to this effect, see Re MacDonald (1962), 34 D.L.R. (2d) 14, affirmed (1964) 44 D.L.R. (2d) 208 - Cheshire p. 453 note 1.

132. At p. 455.

133. Discussed in Lipstein (1963) 12 I.C.L.Q. 835 (Adoption in Private International law); and Adoption in Comparative Private International Law by Rodolfo De Nova, Recueil des Cours, 1961, pp. 75-153.

that of the child and natural parents is ignored. The interests of the child are considered to be safeguarded by the need for its residence within the jurisdiction. Graveson[134] observes that the major factor in this undeveloped body of principles (recognition of foreign acts of adoption) should be one of the choice of law rather than the choice of jurisdiction, though both elements are important. In the absence of any existing rule of applicable law Graveson suggests the cumulative reference to the domicile laws of both parties,[135] irrespective of whether such adoption is effected by the order of a court or by private contract or other act. If adopter and child are of different domciles, Graveson suggests that any court can satisfy itself that the adoption complies with the requirements of both relevant systems of personal law. He points out that the policy of recognition of foreign jurisdiction corresponding to that of English courts has in recent years twice been expressed by the Court of Appeal[136] and once by the House of Lords,[137] now applies in the recognition of foreign jurisdiction to make an adoption order and justifies such recognition when the foreign court acts on a basis corresponding approximately to that of the English Court.[138] In any case, observes Graveson, the English Court would retain its overriding power of regarding the welfare

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134. Graveson: The Conflict of Laws: 6th edn., p. 403.

135. See the proposal of Mr. Justice Scarman (1962) II I.C.L.Q. 635 at p. 638.

136. Re Dulles Settlement (No. 2) [1951] Ch. 842; Travers v Holley [1953] p. 246.

137. Indyka v Indyka [1967] 3 W.L.R. 510.

138. Re Valentine's Settlement [1965] Ch. 831.

of the adopted child as the paramount consideration, a power which it has not hesitated to apply in appropriate cases involving the recognition of foreign orders of guardianship.[139] Cheshire observes[140] that it may be that in the post-Indyka era, English courts will be prepared to recognise foreign adoptions in circumstances where, mutatis mutandis, an English Court would not have jurisdiction proved there was a "real and substantial connection with the foreign Court".[141]

The tenth session of the Hague Conference on Private International Law (1964) produced a draft convention on Adoption.[142] This convention contains 24 articles relating to jurisdiction, choice of law and recognition of foreign adoptions. This convention has now been given effect by the Adoption Act 1968.[143] Article 8 of the convention provides for the recognition of any order made in accordance with the jurisdiction established by Article 3. Article 8 reads thus:

> Every adoption governed by the convention and granted by an authority having jurisdiction by virtue of the habitual residence of the adopter must be recognised without further formality in all contracting states; and the findings of fact on which that authority based its jurisdiction are binding.

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139. Re B's settlement [1940] Ch. 54, cases, 256; McKee v McKee [1951] A.C. 352.

140. At p. 456.

141. North (1968 31 M.L.R. 257, 280-281. Recognition of Foreign Divorce Decrees.

142. The text of the convention is printed in full in (1965) 14 I.C.L.Q. 558 et seq. For a commentary see Graveson 6th edn. pp. 402-3; Lipstein [1965] Camb. L.J. 224, Unger (1965) 28 M:L.R. 463.

143. Halsbury's Statutes of England (3rd edn.) 1968 Statutes p. 1041.

Article 3 lays down:

> Jurisdiction to grant an adoption is vested in the authorities of the State where the adopter habitually resides or of which he is a national.

In a case under Hindu law, in C.S. Nataraja v. C.S. Subbaraya,[144] the Privy Council held that the widow's

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144. (1949) 77 I.A. 33 (P.C.). Also see Sukdeo v. Kapil A.I.R. 1960 Cal. 597 - A Hindu's national law in family matters is his personal law. See also Derrett: Introduction to Modern Hindu Law (1963) p. 128 ff.

In Mira v. Aman A.I.R. 1962 M.P. 212 a Raj Gond, who was not a Hindu, married a Hindu under the Special Marriage Act, 1872, whereupon succession to his property became subject to the Indian Succession Act. His children by this marriage were held entitled to his lands, though neither the Special Marriage Act nor the Indian Succession Act were ever in force in the region where the lands lay on the basis that the status was determined by the law of the place (here a part of India where the Acts were in force) where the marriage was solemnized.

In an earlier Bombay case Ratanshaw v. Bamanji, A.I.R. 1938 Bom. 238, the Bombay High Court had held that even though status would ordinarily be determined according to the law of domicile and such status would be recognised by British Courts, yet for the purpose of succession to the immovable property in British India, the law applicable will be that of British India.

Hence in determining the succession to immovable property in British India of a deceased Parsi who had been a resident of Baroda State, the law applicable will be that prevailing in British India according to which a divorce among Parsis by mutual releases is not a valid divorce and will not be recognised by British Indian Courts though it may be valid in Baroda State. See also Derrett I.M.H.L. p. 130, Note 1.

capacity to adopt a son to herself and the status of the child so adopted were matters to be determined in accordance with the law of her domicile, and that a son adopted by a Hindu according to a foreign law could succeed as a dattaka son to his immovable property in India. In this case a Hindu and after his death his widow, were domiciled in Pondicherry in French India, their personal law being admittedly Hindu as obtaining there. After her husband's death the widow purported to adopt in Madras the respondent who, after her death, alleging that the adoption, which in fact had been held to be effective by the French Courts in Pondicherry and affirmed by the Court of Cessation in Paris, was an effective adoption of himself to the widow under the law applicable i.e. the French law, claimed the suit property, situated in British India, of which the widow had become the owner on her husband's death. It was conceded in the High Court on appeal that "under French law a Hindu widow can adopt a son to herself and that if she does her adopted son succeeds to her estate". Affirming the decision of the High Court, Lord Greene delivering the judgment of the Board observed: (at p. 40)

> "It is not in dispute that a Hindu widow whose personal law is that of British India cannot adopt to herself. But in this case it is conceded that the personal law of Vasavambal (the

> adoptive mother) was Hindu law as obtaining in French India. In the appeal to the High Court it was also conceded that under French law a Hindu widow can adopt a son to herself and that if she does, her adopted son succeeds to her estate. This concession was in their Lordships' opinion properly made. Vasavambal was domiciled in Pondicherry and her capacity to adopt a son to herself and the status of the child so adopted as her adoptive son were matters to be determined in accordance with the law of her domicile i.e. French law".

Further (at p. 42) his Lordship observes

> "Lastly it is argued that to succeed to immoveable property in British India an adopted child must have been validly adopted in accordance with the municipal law of British India and that adoption by a widow not being recognised by that law it could not be relied on in a claim to such property. Their Lordships do not accept this argument. The personal status of the respondent as the heir of Vasambal falls to be ascertained by reference to French law, and for the reasons already given his status has been established. Their Lordships have not been referred to any authority to the effect that some principle vaguely analogous to that which for special reasons governed in English law i.e., that an heir to succeed to English real estate must have been born in wedlock, has the effect of disentitling the respondent from claiming as the adopted son by the law governing his status and they can see no reason in principle why a person who, by the law of his domicile and thus (as is admitted) by the law applicable in British India, must be regarded as the adopted son of the owner of immovable property in India should be regarded as incapable of succeeding thereto any more than he would be incapable of succeeding to movables".

Commenting on this case Derrett observes

> "It is of great interest to note that the view of Professor Rabel, much approved by a recent writer on Adoption,[145] Professor Campbell[146]

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145. Article by Prof. J.D.M. Derrett entitled "Conflict of Laws: Adoption and a difficult Bombay decision" (1956) 58 Bom. L.R. (Journ.) 33-41.

146. The Law of Adoption in New Zealand, Wellington (1952), 175 quoting Rabel, 'The conflict of Laws, Ann Arbor, Chicago (1945) 648-9, that adoptions should be recognised to exactly the extent to which they have been created as measured by the entire legislation of the state of adoption$.

> is directly supported by Nataraja's case and directly negatived by Wilson's case.[113] The different view expressed in the American Re-statement[147] is not glanced at by either decision. It is submitted that the ratio of In re Wilson[113] is irrefutably sound, while the weakness of Nataraja's case[144] is by no means confined to the novel attitude adopted towards the distinction between movable and immovable property".

However as already mentioned above In re Wilson's[113] case has been over-ruled by subsequent decisions[123] which latter appears to be the more progressive and equitable view.

Also the Supreme Court has held in Virdhachalam v Chaldean Syrian Bank Ltd.[148] that the doctrine is that, between two or more territories in which a personal law is applied it will not be the lex situs of the property which will determine who has a right to enjoy or deal with it, but the lex domicilii of the persons claiming to be entitled to it. As a result of this important case Derrett was obliged to reconsider the whole thing in an article entitled 'Private International Law and Personal Laws'[149] wherein he observes the position to be that where the individual is governed bya personal law and the personal law is also administered in a foreign jurisdiction, the decisions of that foreign court on a matter coming within the exclusive scope of the law of his domicile should be recognised by the courts of the domicile, even where the foreign court's view of the personal law differs from that of the court of domicile.[144]

147; This is Professor Beale's view. Restatement of the Law of Conflict of Laws, St. Paul (1934), 209: S. 143; the status of adoption will be given the same effect in another state as is given in that state to the status of adoption when created by its own law.

148. A.I.R. 1964 S.C. 1425 at 1434 col. ii.

149. (1965) 14 I.C.L.Q. 1370-1375.

Following the Privy Council decision in Nataraja's case[144] the Bombay High Court observed in Vasant v Dattoba[150] that there is nothing like a lex loci in India for a Hindu, Muslim, Jain, Buddhist and Sikh and therefore disputes relating to personal relations between parties belonging to these communities will have to be judged by reference to the law of the personal status. In this case the adoption was not valid according to the Kolhapur law for no consent of the husband was given to the adoptive widow, and as rightly pointed out by Derrett[145] it cannot be valid by applying the Bombay law (into which state, the former Kolhapur State had merged).

Considering next Section 16(3) of the Adoption Act 1958, according to this section the devolution of entails and estates accompanying a title as well as the title itself, are expressly excluded from the effects of an order. In such case the property devolves as if Section 16 had not been enacted. "No one suggests" said Viscount Simon in the Lords elucidating this point, "that if any of your Lordships had an adopted child and an only child, the adopted child would, by heredity, become a member of your Lordships' House".

On the other hand, if Dearest had allowed her Cedric to be adopted before he became Little Lord Fauntleroy this would not have prevented his fortunes from being unrolled to their delicious conclusion and equally the foundling earl in real life cannot be deprived of his rights. This provision of the English Adoption Acts seems to detract from the equitable and logical basis of English Adoption Law based on considerations

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150. (1955) 57 Bom. L.R. 1026.

of the welfare of the child and on the'complete severance' of the adopted child from the natural family and his complete substitution into the adoptive family.

Section 13(3) of the Adoption Act 1958 deems an adopter and the person whom he has been authorised to adopt under an adoption order to be within prohibited degrees of consanguinity and they may not marry each other. This was not so under the law before the Adoption Act 1950, but as the Lord Chancellor observed on the point,

> "Surely it is undesirable that (the adoptive father) should be placed in the position where he could even contemplate marriage with that child... I would throw out for consideration whether the corollary of what we are doing ought not to be that, that boy and that girl (two adopted children) become brother and sister in the ordinary way, so that the natural home life which happens in a normal family... should take place in this family".

As regards adoption by one party to a marriage, the law is altered as from 1st Jan. 1959 by the Matrimonial Proceedings (Children Act), 1958. Part I of that Act includes provisions extending the class of children in respect of whom custody and maintenance orders may be made in matrimonial cases in the High Court, so as to include, inter alia, adopted children of one of the parties who have been accepted into the family by the other party. Custody and maintenance may be ordered notwithstanding that the petition is dismissed.

On the other hand, S.25 of the Matrimonial Causes Act, 1950 (variation of settlements) is not similarly extended. And in Best v. Best[151] the Court of Matrimonial proceedings declined to vary a marriage settlement not affected by the enactment now contained in S. 16(2) of the Act so as to bring in an adopted child. The child of the marriage would have suffered financial sacrifice by the variation suggested. Where

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151. [1956] p. 76.

however, the Court was satisfied that the natural children were being compensated for what they were giving up, a variation which let in an adopted child was approved (Purnell v. Purnell.)[152]

As to the effect on the adopter's marriage, in W.V.W.[153] the Court of Appeal held that, in the particular circumstances, the adoption of a child jointly by the parties to a marriage was an act approbating the marriage, and that with other factors this rendered it inequitable and contrary to public policy to annul the marriage for non-consummation . Dealing with the"doctrine of sincerity", Selborne L.C. observed in G.V.M.[154]

> "The real basis of reasoning which underlies that phraseology is this, and nothing more than this, that there may be conduct on the part of the person seeking this remedy which ought to estop that person from having it. ..... The circumstances which may justify it are various, and in cases of this kind, many sorts of conduct might exist, taking pecuniary benefits, for example, living for a long time together in the same house or family with the status and character of husband and wife, after knowledge of everything which it is material to know...."

As to whether approbation is recognised in Hindu law, Derrett observed[155]

> "... The benefits obtained from the marriage even in non-sexual contexts, the length of time that has elapsed before the petition is presented, and the date when the petitioner first learnt of his legal rights will weigh with the Court in deciding whether the petitioner is precluded by 'insincerity' or otherwise under S. 23(1)(e)

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152. (1955) 57 Bom. L.R. 1026.

153. 1952 1 All. E.R. 858.

154. (1885) 10 A.C. 171.

155. Derrett: Modern Hindu Law (1963) para 297.

> (of the Hindu Marriage Act) from succeeding because of the 'legal ground', namely approbation of the marriage, why the decree should not be granted."

However, in a recent case,[156] it has been held that the doctrine of "approbate" and "reprobate" referred to in (1885) 10 A.C. 171, G. v. M.,[154] has no place under the Hindu Marriage Act. In this case a Hindu marriage took place in 1948 and the parties lived together from 1948 to 1956. The respondent wife began to live separately after July 30, 1956 and filed the petition for declaring her marriage with the appellant a nullity on the ground of impotency, on March 19. 1962. Their Lordships of the Delhi Bench allowed the relief originally by the Petitioner (Respondent) and observed that lack of sincerity on her part or her approbation of the marriage cannot make the appellant potent. The want of sincerity on the part of a spouse or his or her approbation of the marriage may be an element which can be taken into consideration in deciding whether the complaint of impotence was true. The Hindu society looked with disfavour on dissolution of marriages and the respondent said that her parents told her that if her marriage with the appellant was dissolved, their society would shun them and it would be difficult for them to get alliances for the daughters of her sisters and brothers. Therefore, she hesitated for long before approaching the Court. The evidence on this point was believed by all the Courts and they accepted the explanation for delay as it accorded with the facts of life.

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156. S.v. R. A.I.R. 1968 Delhi 79.

W. v. W. was distinguished in Slater v. Slater[157] where the wife was unaware at the time of the adoption that the law provided a remedy for her in respect of her husband's incapacity.

If a marriage between joint adopters is annulled or dissolved, or if a decree of judicial separation is pronounced, an order for custody of the adopted infant may be made under S. 26(1) of the Matrimonial Causes Act 1950 (see Martin v. Martin)[158] An adoption order, however, supersedes any previous custody order (Crossley v. Crossley).[159]

The effect of S. 212(2) of the Income Tax Act 1952 is that an adopter is entitled to the like reliefs from income tax by way of child allowance provided that no other individual is entitled to the allowance or that any other individual so entitled has relinquished his claim thereto.

For the purposes of enactments relating to friendly societies, collecting societies or industrial insurance companies, Section 14 of the 1958 Act, lays down that an adopter shall be deemed to be the parent of the infant whom he is authorised to adopt under an adoption order. Further, where, before the making of an adoption order in respect of an infant, the natural parent of the infant had effected an insurance with any such society or company for the payment, on the death of the infant, of money for funeral expenses, the rights and liabilities under the policy shall by virtue

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157. [1953] 1 All. E.R.

158. [1930] 46 T.L.R. 257.

159. [1953] p. 97.

of the adoption order be transferred to the adopter, the adopter being treated as the person who took out the policy (S. 14(2)). By a provision enacted in 1958, references in S. 11 of the Married Women's Property Act 1882 to a person's children are to include and be deemed always to have included, references to children legally adopted by that person.[160] Section 11 of the 1882 Act created a trust in favour of the spouse and children of the assured in the case of certain policies effected by a married person, and it had previously been held (In Re Clay's Policy)[161] not to extend to a case where the named beneficiary was an adopted child.

Speaking generally, a child is in the position of a natural child of his adopters in connection with industrial insurances, income tax, family allowances etc.

The laws in certain other countries

In the United States, as in the United Kingdom, the effect of an adoption order is generally that the adopter assumes all the rights and obligations of the natural parents. But each of the different states has a different law. In many of the states such as California, Connecticut, Washington, Delaware etc., the adopted child inherits from the adoptive parents and their relatives and vice versa.[162] In some states

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160. Adoption Act 1958, S. 14(3); Sched. V, para. 2.

161. [1937] 2 All. E.R. 548.

162. Martindale: Law Directory (1963) Vol. IV: Arizona, p. 72; California, p. 137; Colorado, p. 185; Connecticut, p. 227; Delaware, p. 277; Columbia, p. 304; Florida, p. 334; Hawaii, p. 411; Idaho, p. 434; Iowa, p. 561; Kansas, p. 591; Kentucky, p. 633; Maryland, p. 767;

F/note contd. on next page

such as Massachusetts and Virgin Islands the adoptive children and their issue inherit from the adoptive parents but do not inherit from relatives of the adopters.[163] In the States of Maine, New Hampshire, Ohio etc. the adopted child does not inherit property of adoptive parents expressly limited to the heirs of the body of the adopters nor the property from their collateral kindred.[164] In these[164] and other States such as Alabama, Massachusetts, New York, Texas, Illinois etc. the adopted child inherits from and through natural parents and other kin but the natural parents and their kindred cannot inherit from him unless the adoption decree specificially provides.[165] In New Jersey an adult adoptee does not lose the right of inheritance from natural parents and their kindred but his right of inheritance from the adopting parents is subject to certain limitations.[166]

Footnote 162 continued from previous page.

Missouri, p. 991; Nebraska, p.1066; Michigan, p. 868; Minnesota, p. 910; Mississippi, p. 949; Nevada, p. 1110; New Jersey, p. 1198; New Mexico, p. 1254; N. Carolina, p. 1359; N. Dakota, 1408; Ohio, p.1449; Oklahoma, p. 1500; Oregon p. 1544; Pennysylvania, p. 1578; Puerto Rico, p. 1630; Rhode Island, p. 1657; S. Carolina, p. 1356; S. Dakota, p. 1740; Tennessee, p. 1788; Texas, p. 1821 (adoptee inherits from both the natural and adoptive parents); Utah, p. 1865; Vermont, p. 1895; Virginia, p. 1920; Virgin Islands, p. 1961; Washington, p. 1979; W. Virginia, p. 2015; Wisconsin, p. 2051; Wyoming, p. 2097. Also see article by H.W. Baade: Inter-State and foreign adoptions in North Carolina; (1962) 40 N.C.L. Rev. 691.

163. Martindale: Law Directory (1963) Vol.IV. Louisiana, p. 687; Massachusetts, p. 809; Virgin Islands, p. 1961.

164. Martindale: Law Directory (1963) Vol. IV. Maine, p. 735; New Hampshire, p. 1145; Ohio, p. 1449; Vermont, p. 1895; Virgin Islands, p. 1961; W. Virginia, p. 2015.

165. Martindale: Law Directory (1963) Vol. IV. Alabama, p. 3; Arkansas, p. 101; Illinois,p. 469; Indiana, p. 523; Louisiana, p. 687; Maryland, p. 767; Massachusetts, p. 809; Michigan, p. 868; Montana, p. 1031; New York, p. 1289; Texas, p. 1821; Vermont, p. 1895.

166. Martindale: Law Directory (1963) Vol. IV. New Jersey, p. 1198.

The Canadian law has strong links of sympathy and practice with U.S. adoption work and the transfer of parental rights, resembles the continental type of adoption. In Alberta the mutual rights of inheritance are the same as a natural parent and child between the adopter and adoptee, but the child also retains the right to inherit from natural parents.[167]

In British Columbia the adopted person was, before 1956, entitled to succeed to the real and personal property of the legal descendants and no other of the kindred of his adoptive parents as if born to such parent in lawful wedlock. The adopted child did not lose his rights of succession to his natural parents or kindred. If a person adopted died intestate, his real and personal property received by gift, will, settlement, inheritance or succession from his natural parents or kindred was distributed as if no adoption had taken place, and all his other real and personal property was distributed in the same manner as if he had been born to his parent by adoption in lawful wedlock. This type of adoption seemed to resemble, the customary adoptions in India,[168] and the rules of succession were akin to the rules of succession to the property of a female Hindu dying intestate as laid down in Section 15 of the Hindu Succession Act 1956. It may be observed that whilst under the Hindu and English Laws there is almost 'complete severance' of the adopted child from the natural family and his substitution into the adoptive family, the laws of inheritance in other countries vis-à-vis the

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167. Martindale: Law Directory (1963) Vol. IV, p. 2224.

168. See pages 514 et seq.

adopted child do not appear to be as strictly logical. However in British Columbia the Adoption Amendment Act 1956 repealed S. 12 of R.S. 1948, C. 7 and provided that for all purposes an adopted child became on adoption the child of the adopting parent, as if the child had been born to that parent in lawful wedlock and that the relationships of persons to one another should be determined accordingly.[169] These provisions do not apply for the purposes of the law of incest or prohibited degrees of marriage.

The French law recognises two different types of adoption,[170] resembling in its effects to some extent the different types of adoption formerly recognised under the Hindu law. The two types of adoption are the simple adoption and adoptive legitimation, the more complete type being reserved for very young children. In the former the link is established between the adoptive parents and the child and not with the whole family. The latter was a status created in 1939 wherein the child enters completely into the total family of the adopters and becomes their child as though born to them in wedlock. In the case of a simple adoption even a single person may adopt whilst adoptive legitimation may only be arranged for married people adopting together and for children under 5 years, who must be orphans, foundlings or abandoned by their parents, and the greater family must be told of the adoption. Such a child inherits as a child of the marriage except where he is expressly disinherited. In

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169. Also see Martindale: Law Directory (1963) Vol. IV, p. 2247.

170. Margaret Kornitzer: Child Adoption in the Modern World, p. 323.

Norway, Switzerland as also in Spain the adopted child retains his rights of inheritance in the natural family[171] but parental responsibility is transferred to the adopter who gives the child his name. In the Latin American countries, except in Uruguay the relationship created by adoption is limited to the adopters and the adoptee. In Uruguay, however, under the 1945 law, all natural ties are severed. As in France there are two kinds of adoptions. One, under the Children's Code of 1934 is adoption with limitations whilst the other form "adoptive legitimation", like the similar modern status in France, is complete adoption and is available only on behalf of special categories of deprived children.[172]

In Norway[171] adopted children inherit a share of the adopters estate equal to half what a child born to the adopter in wedlock would have received, but the adopters do not automatically become heirs of the adopted child if the latter leaves natural relations legally entitled to inherit. In Switzerland the adopted child inherits from the adopting parent, though not from the adopter's relations, and he also retains his rights of inheritance from the whole of his natural family.[171] An official explanatory note accompanying the articles in the civil code relating to adoption states

"... The code relates adoption to two simple

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171. Margaret Kornitzer: Child Adoption: Norway (p. 327); Switzerland (p. 330); Spain (p. 335). Also Martindale: Law Directory (1963) Vol. IV, Switzerland (3015); Greece (p. 2693) - adoptee inherits from adopter but not from relatives of adopting parents. The adopter does not inherit from the adoptee, nor the latter's relatives.

172. Kornitzer: Child Adoption, p. 341.

> principles: it is the creation of an artificial relationship and is bound therefore to imitate nature in order to avoid anomalies. Secondly it must serve legitimate interests and not encroach on the rights of others".

In Australia the adoption law varies in the different states. In Queensland the adopted child secures "full hereditary rights in the estates of the adopting parents".[173] In Victoria the adopted child inherits in intestacy the property of the adoptive parent to the same extent as a child born to the adopter in wedlock, although he does not automatically inherit the property of any relatives of the adopters. The adopted child loses the right to succeed to the estate of his natural parents but not the right to succeed to the estates of relatives of his natural parents.[174] In New South Wales the adoption order terminates all rights and liabilities between the natural parents and the child except the right to inherit property.[175] In Tasmania and New Zealand adopted children inherit in the same manner as natural children from their adopters but from nobody else of their adoptive family.[176] A note in the Tasmanian Act of 1920 refers to a New Zealand precedent, dated 1916, whereby it was established that the rights of parents by adoption and those claiming through them in the property of an adopted child prevail over the rights of the child's natural parents. In Southern Rhodesia the adopted child has no rights of automatic inheritance to the adopter's estate and he does not lose any inheritance rights

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173. Kornitzer: Child Adoption, p. 249.

174. Kornitzer: Child Adoption, p. 252.

175. Kornitzer: Child Adoption, p. 247.

176. Kornitzer: Child Adoption, pp. 255 and 257 respectively.

he may possess in his natural family.[177] In S. Africa adoption is governed by Act No. 33 of 1960. This Act is framed on the English Act.[178]

It would thus be seen that whilst under the Hindu and English laws there is complete severance of the adopted child from his natural family and his substitution in the adoptive family and he is regarded as a child for all purposes in the adoptive family, the laws of inheritance in other countries do not appear to be as strictly logical.

Under the Hindu law, however, on account of the Institution of joint family the adopted son acquires a vested interest in the ancestral property of his adoptive father on adoption and does not become divested of such interest although its value (at an eventual partition) may be altered by the birth of real sons. The rights of the adopted son become, on adoption, indefeasible by transfer either inter vivos or by will, except as modified by the Hindu Succession Act, 1956. As there is no such Institution like the Hindu joint family system, in other legal systems there is no restriction on the adoptive father's right to dispose by gift or will of property which he might have inherited from his ancestors.

Again according to S. 16(3) of the Adoption Act 1958 the devolution of entails and estates accompanying a title as well as the title itself are expressly excluded from the effects of an order. In such case the property devolves as if Section 16 had not been enacted. Under the Hindu law,

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177. Kornitzer: Child Adoption, p. 263.

178. Martindale: Law Directory (1963) Vol. IV, p. 2983.

however, there is no such restriction on the adopted child as the adopted child is considered as a "child for all purposes". It would appear that this provision under the English law detracts from the equitable and logical basis of English Adoption law based on considerations of the welfare of the child and his 'complete severance' from the natural family and substitution into the adoptive family.

According to S. 13(3) of the Adoption Act 1958 (reproducing S. 10(3) of the 1950 Act) an adopter and the person whom he has been authorised to adopt under an adoption order are to be within the prohibited degrees of consanguinity for the purpose of the law relating to marriage. The sub-section appears not to bring any relatives of the adopter within the fiction of consanguinity with the adopted person. Thus as the law stands there is nothing against the marriage of adopted brothers and sisters or others related through adoption, and although for some of the purposes of the law adopted brothers and sisters are regarded as brothers or sisters of the whole or half blood, consanguinity is not affected. This seems to be anomalous. Under the Hindu law and in some other countries like the Australian State of Victoria the prohibitions with respect to marriage within the degrees of consanguinity or affinity apply both to the adoptive and natural relatives.[179]

Also as to relationships outside marriage, although an adopter may not marry an adopted child there is nothing to forbid their sleeping together. The question of incest

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179. See also Margaret Kornitzer: ChildAdoption in the Modern World, p. 251.

between the adopter and adopted seems not to have been forgotten when the law was framed, but the law was not anxious to add to the list of criminal offences.[180] This anomaly should be rectified in the interests of the child and the community and the law made to conform to logic.

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180. M. Mornitzer: Child Adoption, p. 143.

CHAPTER IV

SHARE OF THE DATTAKA IN COMPETITION WITH AFTER-BORN AURASA SON OF THE ADOPTER

Smriti Law

(1) Manu in Chapter IX, verses 163 to 165 says: "The Aurasa son alone is the sole heir of his father's wealth; but as a matter of compassion, he may give maintenance to the rest" (v. 163); "And, when the son of the body has taken an account of the paternal inheritance, let him give a sixth part of it to the son of the wife begotten by a kinsman before his father's recovery; or a fifth part, (if that son be eminently virtuous)" (v. 164); and in V. 165 he says "The son of the body, and the son of the wife, may succeed immediately to the paternal estate in the manner just mentioned; but the ten other sons can only succeed in order to the family duties and to their share of the inheritance, those last named being excluded by any one of the preceding". The Mitākharā interprets Manu IX, 163 as applying to the other class of sons "who are devoid of good qualities" and says that the general rule as to a fourth share is not affected by Manu's text.

(2) According to Vasistha as cited in the Mitākharā "when a son has been adopted, if a legitimate son be afterwards born, the given son takes a fourth share".[1]

(3) Katyāyana is quoted in the Dayābhāga, Colebrooke's Digest, Vol. II, page 348 as saying "A son of the body being born,

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1. Vasistha XV, 8, 9, Mit. 1, XI, 24.

the adopted sons of the same class take one-third of their portion". But in the Madanapārijātha, Vīramitrodaya, Mitākṣharā, Sarasvatī Vilāsa, the Mayūkha and the Dattaka Mīmāṁsā the sage is quoted as allotting only a fourth part.

(4) Baudhayana says "If after the performance of these (rites) a legitimate son of his own body is born (to the adopter, then the adopted son) receives a fourth (of the legitimate son's)share.[2]

(5) Vishnu says that the legitimate son should support the other sons.[3]

(6) The same rule as laid down by Katyayana above is given in a text cited in the Dāyabhāga as a text of Devala.[4]

(7) As against these Smriti writers there is a text attributed to Vriddha Gautama which gives an equal share to an adopted son endowed with good qualities with the natural born son.[5] According to Golap Chander Sircar and Ghose this text is an interpolation and Mr. Shyama Charan Sircar in his Vyavastha Chamdrikā inclines to the view that the text is obsolete.[6]

Views of the Commentators

In his Mitākshara, Vijnaneswara refers to a number of Smritis and propounds the rule that the adopted

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2. Prasna VII, Adhyaya V, Translation in Principles of Hindu Law by J.C. Ghose, 2nd Edn., pp. 641-642.
3. Vishnu XV, 30.
4. Dayabh Ch. X, 7,9.
5. Datt. Mim. V. 43, Datt. Chandrikā V, 32.
6. Karturi Gopalan v. Karturi Venkataraghavulu (1915) 31 I.C. 574, 576. See Vyavastha-Chandrika by Shyama Charan Sircar (1880) Vol. II, Book III, Ch.II, IV para 360 (Page 169). A similar view is expressed in his Vyavastha - Darpana (1867 edn.) Para. 627 i.e. That the adopted son gets a diminished share in competition with an after-born legitimate son of the adoptive father.

son's share is a fourth of the Aurasa son's.[7] The Madana-pārijātha and the Vīramitrodaya adopt the rule given in the Mitākharā. The Saraswatī vilāsa after a full discussion, concurs in the same view.[8] The Dattaka Mīmāṁsā and the Vyavahāra Mayūkha also favour the one-fourth share for the adopted son.[9] On the other hand, according to the Dāyabhāga and the Dattaka Chandrikā the adopted son gets a third share.[10] Nanda-Pandita, in his Vaijayanti opines that the adopted son gets one-third or one-fourth shares according to the degree of virtue that the after-born Aurasa son possesses.[11]

The text of Vriddha Gautama has been explained away by the author of the Dattaka Chandrikā and the Dattaka Mīmāṁsā. According to the former, the text applies to Sudras[12] only, whilst according to the latter it refers to an after-born son absolutely destitute of good qualities.[13] The author of the Dattaka Chandrikā refers to the fact that among Sudras, illegitimate sons are given at least a third share in competition with legitimate sons, and argues that the adopted sons should not be in a worse position.

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7. Mitākharā, Ch. I, Section 11, pl. 24 et seq.
8. Para. 19, (1915) I.L.R. 40 Mad. 632: Karturi Gopalan v. Venkata (1915) 31 I.C. 574, 576; Ayyavu v. Niladatchi (1862) 1 Mad. H.C.R. 45.
9. Dat. Mim. X, 1; V. Mayuk IV, 2, 25.
10 Dayabhaga X, 9; Datt. Chand. V, 16-17, 3 Dig. 154; Dat Chand. V, 16 Suth. Syn. Note XXII, Dig. V, 301. Kautilya (Arthasastra II, 42) also prescribed a third share.
11. Referred to by Kapur in his law of Adoption in India and Burma (1933 edn.) p. 447.
12. Datt. Chand. V. 32.
13. Datt. Mim. V, 43.

Adopted son is not an equal sharer with after-born Aurasa son.

Their Lordships of the Madras High Court in Karturi Gopalan v Karturi Venkataraghavulu[6] point out in this connection that, whatever may be the social status of an illegitimate son, the fact that he is of the same flesh and blood as the person whose property he seeks a share in, may account for the favourable position assigned to him. As to the interpretation given by the Dattaka Mīmāṁsā, their Lordships in the same case[6] opine that the reference apparently is to the quality which a person to be adopted is expected to possess. Manu in Chapter IX, sloka 169, describes an adopted son thus

> "He is considered as a son made or adopted, whom a man takes as his own son, the boy being equal in class, endowed with filial virtues, acquainted with the merit of performing obsequies to his adopter, and with the sin of omitting them".

Their Lordships observe that this was the reason why Nanda Pandita translated Vṛiddha Gautama's text in the way mentioned above and opine that Gautama's rule was an exception to the general law. It would be impossible, observe their Lordships, to administer such a rule by the Courts, as the determination whether a man ... possesses good qualities would lead to endless conflict of views. The author of Dattaka Mīmāṁsā, after examining Vṛiddha Gautama's text carefully, inclines to the view taken by Vijnaneswara and the other commentators. Thus with the exception of the Dattaka Chandrikā, all the commentators agree in not giving an equal share to the adopted son.[13a]

The share of the adopted son in competition with Aurasa son.

Modern writers on Hindu Law have noticed this conflict but have not settled it although most of them have

13a As to the rule in the case of sudras refer to pp. 185-87.

accepted the view taken by the Mitakshara. It is not clear whether the expressions one-third or one-fourth used in the texts means a share out of the entire estate or a share of what the Aurasa sons get? G.S. Sastri and J.L. Kapur are of the view that the expressions quarter and third share do not appear to be used with reference to the estate, for if that were so, he would be in a better position than a real legitimate son if there be three or more such sons.[14] So also J.C. Ghose and Siromani Bhattacharya are unhesitatingly for a fifth share and Messrs West and Bühler and Dr. Jolly are also of the same opinion. Mr. Mayne expresses no definite opinion on the question. He says that in Ceylon, the adopted son shares equally with the Aurasa son.[6] On the other hand Macnaghten in his Hindu Law Vol. II, p. 184 quotes the opinion of a Pandit according to which the adopted son takes one-fourth of the entire estate thus obtaining one-third of what the legitimate son gets.

Prof. H.H. Wilson has tried to explain this apparent conflict by pointing out that to interpret the phrase "a quarter share to mean a fourth of the whole inheritance would reconcile the two readings of Vasistha's aphoristic text with each other, and both with the metrical text namely by taking 1/3, where it occurs, to mean 1/3 of the after-born son's share and 1/4th to mean 1/4 of the whole estate i.e., dividing the property into four parts, the Aurasa son taking 3 parts and the adopted son one part.[15] Their Lordships of

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14. The Hindu Law of Adoption by G.S. Sastri (1891 edn.) p. 398 & Law of Adoption in India and Burma: J.L. Kapur (1933) p. 449.

15. Wilson's Works V, 52; Giriappa v Ningapa (1893) I.L.R. 17 Bom. 100, 105.

the Bombay High Court, in Giriappa v Ningapa[15] observe that there are difficulties even on this construction e.g., in the case of four or more sons being born after the adoption and according to the principle laid down by the Privy Council in The Collector of Madura v Mootoo Ramalinga[16] the Court must give effect to what it finds to be the interpretation of Vasistha's text actually current as shown by the modern Digests in general use and not enforce as law a doubtful inference from the words of ancient Smriti writers.

The following rules were laid down by the Courts in the different Provinces:-

(i) In Bengal under the Dayabhaga school the adopted son took 1/3 share of the inheritance.[17]

(ii) In the parts of India following the Benares school he took 1/4 of the adoptive father's estate.[18]

(iii) In Southern India, Bomay and Bengal, in cases governed by the Mitakshara law he took a fourth of the Aurasa son's share or 1/5 of the father's estate.[19]

Madras view:

In Ayyavu v Niladatchi[20] the Madras High Court held that the share of an adopted son was 1/4 of the share of

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16. (1868) 12 Moo. I.A. 397.

17. Birbhadra v Kalpataru [1905] 1 C.L.J. 388, 404. (The Bengal law is stated in a Mitakshara case).

18. Parmanand v Shivcharan (1921) I.L.R. 2 Lah. 69; and also amongst Jains, Rukhab v Chunilal (1892) I.L.R. 16 Bom. 347.

19. Venkammamidi v Triambakam (1920) I.L.R. 43 Mad. 398; Giriappa v Ningappa (1893) 17 Bom. 100; Tukaram v Ramchandra I.L.R. (1925) 49 Bom. 672; Sahebgouda v Shiddangouda I.L.R. [1939] Bom. 314, 316 (F.B.).

20. (1862) 1 Mad. H.C.R. 45.

a son born to the adoptive father after the adoption. Their Lordships observed that it was true that in the Mitākshara (Ch. 1, Sec. II, par.24), the share of the adopted son,where a begotten son springs up, is declared to be a one-fourth share, but it is explained in the Saraswatī Vilāsa that this is to amount to a fourth part of what a begotten son is to have i.e., the estate is to be divided into five portions of which the begotten son is to have four and the adopted son, one. The latter gets thus but one-fifth of the whole property. The Pandits being in attendance had explained to the Court that such was the law. The editorial notes mention the following as the then unprinted passage from the Sarasvatī Vilāsa referred to in the judgment: Per Vasistha: "And when there has been an adoption, if a legitimate son be afterwards born, let the given son share a fourth part".[20a] the mention of "a given son", says the note, is intended for an indication of others also, as the son bought, son made, and the rest, according to the difference of son-making. According to Kātyāyana "And when a legitimate son is born the (other) sons are takers of a fourth part, (provided they are) of the same class, and those not of the same class are entitled to maintenance". "Those of the same class", explains the note i.e., son raised on the wife, son given etc., share a 1/4 part, there being a legitimate son. A fourth part means, a portion equal to 1/4 of the share (of a legitimate son) i.e., a fifth share, inasmuch as a smriti declares a son given, a son made etc., to be entitled to a 1/5 share in the event of a legitimate son being born afterwards. The editorial note further says "Those not of the same class" i.e., son of the unmarried girl, son of the concealed birth, son of a

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20a. See Thomas Foulkes: The Hindu Law of Inheritance according to the Sarasvatī-Vilāsa (London 1881) Para 377. (Translation from the original Sanskrit).

pregnant bride, and son of a twice-married woman. But according to the Vyavahāra Mayūkha, some authorities in the quotation from Kātyāyana have 'third part'.[21] In Karuturi Gopalan v Karuturi Venkataraghavulu[22] the Madras High Court again held that under the Hindu Law, even among Sudras, an adopted son was entitled to 1/4 share of the subsequently born Aurasa son i.e., 1/5 of the estate, where there was one Aurasa son.

Bombay

The Bombay and Calcutta High Courts have interpreted the texts in a similar manner. In Giriappa v Ningappa the Bombay High Court held that in Western India, both in the districts governed by the Mitākshara and those specially under the authority of the Vyavahāra Mayūkha, the right of the adopted son, where there was a "legitimate son" born after the adoption, extended only to a fifth share of the father's estate.[23] In this case the court of first instance awarded the Plaintiff (the adopted son) a fourth share in the father's property in competition with an after born legitimate son. On second appeal to the High Court by the defendant (the legitimate son) it was contended that the adopted son was

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21. The reporter was informed by Prof. Buhler that according to the Vyar Mayūkha some authorities, in quotation from Kātyāyana have "trittyâmcaharâh sutâh". - Vyav. May. Ch. IV; Sec. V, para.25.

22. (1915) 31 I.C. 574, 576.

23. Giriappa v Ningappa (1893) I.L.R. 17 Bom. 100; Nagindas v Bachoo (1916) I.L.R. 40 Bom. 270 (P.C.); Tukaram v Ramchandra (1925) I.L.R. 49 Bom. 672 (a case of Agris who are probably not Sudras). Also in MOTI v LACHHMAN A.I.R 1960 Raj. 122

only entitled to a one-fifth share in the father's property. In this case the question turned on the meaning of the equivalent phrase, where a "legitimate son" is born after the adoption, the adopted son "shares a fourth part". Their Lordships observed that in Narayan Babaji v. Nana Manchar[24] it was commented that the Mitākharā had set out the text of Vasiṣtha but said nothing as to the interpretation of it. The Vyavahāra Mayūkha IV, V, 25 was explicit on the point and stated that the adopted son took 1/4 of the Aurasa son's share. The Vīramitrodaya and Dattaka Chandrikā threw no light on the subject. The Dattaka Mīmāṁsā says "receives a quarter, not an entire share" (according to their Lordships the correct translation could be "not an equal share, possibly referring to some opinion that the two share equally). Hence their Lordships inferred that the Dattaka Mīmāṁsā meant one-fourth of the legitimate son's share. According to the Smṛiti Chandrikā the adopted son took 1/4 share in the inheritance. Their Lordships also referred to the view of Prof. H.H. Wilson mentioned above at page 174 (footnote 15) and pointed out that as laid down by the Privy Council in Collector of Madura's case, in interpreting the Smṛiti texts, the opinion of recognised commentators should be followed. Among the modern English writers Strange leaves the point in uncertainty and so also do West and Bühler. Mayne mentions 1/4 of legitimate son's share in the Bombay school. J.S. Siromani Bhattacharya and G.C. Sirkar opine that the adopted son takes 1/4 of the legitimate son's share. Their Lordships referred to the decision of the Madras High Court in Ayyavu v. Niladatchi[8]

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24. (1870) 7. Bom. H.C. Rep. A.C.J. 153.

where it was held on the authority of the Saraswatī Vilāsa that the adopted son took 1/4 of the legitimate son's share; with which view their Lordships agree.

In the Smṛiti texts Vasiṣṭha and Katyayana are quoted as giving the adopted son a quarter and one-third share respectively. But it is not clear whether these shares mean the share out of the entire estate or a share of what the Aurasa son receives. In this respect I am inclined to agree with the view of Prof. H.H. Wilson mentioned above. For reading Vasiṣṭha and Katyayana together the texts seem to mean that the adopted son's share is 1/3 of the legitimate son's share or 1/4 of the Estate. Where the Smṛitis are silent, equity demands that the benefit of doubt should be given in favour of the adopted son, who gives up his rights in the natural family.[24a]

When laying down the rule, possibly Vasiṣṭha had only one after born legitimate son in mind. If there be more than one son, then reading Vasiṣṭha and Katyayana together an on an equitable interpretation the adopted son would take 1/3 of the natural son's share.

Again in Tukaram v. Ram Chandra[23] the Bombay High Court held that in the Bombay Presidency, under Hindu law, an adopted son was entitled on partition to a 1/4 of the share of the after-born Aurasa son and that no distinction is drawn in the case of Śūdras. Crump J. observed that the argument that the parties were Śūdras and that in the case of Śūdras the adopted and after-born Aurasa son took equal shares on the authority of the Privy Council decision in

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24a Derrett, J.D.M. is of the view that the Dattaka ought to take 1/4 of what any Aurasa takes, i.e., 1/5th of the estate and 1/9 if there be two Aurasas. See his Introduction to Modern Hindu Law (1963) para 186. In other words 1/4 = 1/4 of Aurasa's share and 1/3 = 1/3 of Aurasa's share.

A.Perrazu v Subbarayudu[25] does not hold for Bombay as this case was an authority for Madras and Bengal. Further the parties in the present case were "Agris" by caste, who are probably not Śūdras. Their Lordships referred to Giriappa v Ningappa[23] wherein it was held that the share of the adopted son was 1/4 of the share of the after-born son; and observed that this had always been the rule. It was stated in Steele's work on Hindu law and customs as far back as 1868 that there was no exception to the rule in the case of Śūdras. The ratio decidendi in Perazzu's case[25] is as follows

> "The inference which their Lordships draw from the materials before them is that the rule of the Dattaka Chandrika that on a partition of the joint family property of a Sudra family an adopted son is entitled to share equally with the legitimate son born to the adoptive father subsequent to the adoption has been accepted and acted upon for at least more than a century in the Presidency of Madras, as the law applicable to such cases to Sudras. It also appears to their Lordships that the rule of the Dattaka Chandrika, although not supported by any ancient text of the Smritis or by the Mitakshara, is not inconsistent so far as Sudras are concerned with the Smritis or the Mitakshara".

Their Lordships observed that in the Bombay Presidency, where the rule of the Dattaka Chandrika upon the question at issue has never been followed, for no case and no kind of judicial or other pronouncement was forthcoming, ought they to accept the rule upon the authority of the Dattaka Chandrikā alone? Their Lordships opined that they should err if they did so. The authority of the Dattaka Chandrikā had never been placed

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25. (1921) L.R. 48 I.A. 280; 4 Mad. 56.

so high in Western India as in Bengal and Madras[26] and their Lordships opined that the case was one where the principle of stare decisis should be maintained. The Calcutta High Court has also held that the right of the adopted son, where there was one legitimate or natural son born after the adoption, extends under the Mitākshara only to 1/5 share of the adoptive father's estate, in other words, the adopted son takes a fourth share of what is taken by the subsequently born legitimate son.[27] In the case of Parmanand v. Shiv. Charan Das[28] the Lahore High Court referred to and relied on Para. 168 of Mayne's Hindu Law wherein it was pointed out that the adopted son takes 1/4 of the entire estate of adoptive father in Mitākshara provinces and held that among Khatris of Amritsar, the adopted son takes 1/4 of the entire estate where there is a subsequently born Aurasa son. This seems to be a more equitable interpretation of the texts.

Partition during father's lifetime.

In Venkammamidi v. Venkata[29] the Madras High Court held that in a suit for partition during the lifetime of a Hindu father, the father and a natural born son were entitled to 8 shares of the property and the adopted sone to one share. Their Lordships observed that if Manu's text in Ch. IX, 163

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26. Sri Balusu v. Sri Balusu (1899) L.R. 26 I.A. 113; 22 Mad. 398; Waman v. Krishnaji (1889) 14 I.L.R. Bom. 249.

27. Birbhadra v. Kalpatru 1 C.L.J. 388 where the cases of Giriappa v. Ningappa (see note 23); Ayyavu v. Niladatchi (see note 8) referred to and followed.

28. (1921) I.L.R. 2 Lah. 69; 59 I.C. 256. Also in Anandi v. Onkar, A.I.R. 1960 Raj. 251.

29. (1920) I.L.R. 43 Mad. 398. Also refer to the S.C. decision in Guramma v. Mallappa A.I.R. 1964 S.C. 510 discussed at pp. 195-96 and Derrett's 1 M.H.L. cited at note 59 (p.195).

were to be applied literally, the adopted son would be entitled to maintenance and nothing more, but Vijnaneswara commenting on Yajnavalkya's text points out that this rule must be restricted to the case where the adopted son was not a good man. Since then Vasistha, Katyāyana and Baudhāyana have laid down rules as to the adopted son's share and they all say that the adopted son is entitled to 1/4 share. The interpretation of this, according to the Madras High Court is that the property was to be divided into 5 shares, 4 shares to be allotted to the Aurasa and one share to the adopted son. It was contended that the rule of Vasiṣṭhā should be confined to suits between the adopted and Aurāsa sons and not when the suit is between the father and sons, relying on Pratap Singh v Agar Singji[30] wherein their Lordships had pointed out that the adopted son was in the same position as the natural son. This observation was made with respect to the right of maintenance.

Adopted son shares equally with natural sons in collateral succession

In Nagindas v Bachoo Hurkissondass[31] it was held that the adopted and natural sons were entitled to equal shares in collateral succession. In Gangadhar v Hiralal[32] it was laid down that the rule should not be extended to cases of stridhan succession. In Narasimhappa v Chinna Kenchappa[33]

30. (1919) I.L.R. 43 Bom. 778 (P.C.).

31. (1916) I.L.R. 40 Bom. 270 (P.C.).

32. (1916) I.L.R. 43 Cal. 944 (P.C.).

33. (1917) 38 I.C. 244 (Mad.).

and Subbarayudu v Perarazu[34] it was taken for granted that even if the suit was brought in the father's lifetime the text of Vasistha would be applicable but in these cases there was no discussion on this point. In the Mitakshara section 1 defines 'Daya', sec. 2 deals with rules relating to partition in the father's lifetime, sec. 3 with partition after the father's death; secs. 4 to 10 deal with matters applicable to both classes of partition and sec. 11 discusses the right of the adopted son in competition with an after-born Aurasa son. Their Lordships therefore observed that sec. 11 must be considered as belonging to the same category as sections 4 to 10. In the Dattaka Chandrika, Dattaka Mimamsa and Sarasvati Vilas, the rule of Vasistha is quoted as of general application to all cases of partition, the principle being that the adopted son is entitled to a limited share. In cases of collateral succession his share is as extended as that of a natural born son. Their Lordships observed that according to Baudhāyana the adopted child had to give and provide at the time of the adoption that he would not claim more than 1/4 share of the father's property if a natural son is born.

Law in Ceylon and Pondicherry

The Thesawaleme and M. Gibelin are quoted by Mr. J.L. Kapur to the effect that the rule in North Ceylon and Pondicherry is according to Vriddha Gautama and all classes of Hindus allow an adopted son to share equally with the real

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34. Appeal No. 104 of 1914 (unreported).

son.[35]

The Illotam son-in-law

In Hanumantamma v Rama Reddi[36] the Madras High Court held that for the purpose of succession the Illotam son-in-law stands in place of a son and in competition with the natural born son takesan equal share.

The rules applicable to Jains

In Rukhab v Chunilal[37] the Bombay High Court held that in the absence of special custom the ordinary Hindu law applies to Jains and the adopted son is entitled to 1/4 estate of the adoptive father if the natural son is born after the adoption. In this case the appeal was by one R the posthumous son against the decision of the District Judge that according to custom prevalent amongst Jains, the adopted son took an equal share with the subsequently born natural son. Their Lordships of the Bombay High Court observed that the texts quoted by West & Buhler (at pages 388, 773, 935 and 1187) show that under the Mitakshara law, the adopted son is usually entitled to 1/4 of the estate. The law was settled by the Privy Council decision in Chotay Lall v Chunno Lall[38] that the Hindu law of inheritance is to be applied to Jains in the absence of usage and custom varying that law. Reference

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35. Thesawaleme 11, 2; 1 Gib. 82, J.L. Kapur: The Law of Adoption in India and Burma (1933) p. 451.

36. (1880) I.L.R. 4 Mad. 272.

37. (1892) I.L.R. 16 Bom. 347.

38. (1878) L.R. 6 I.A. 15.

was also made to Bachebi v Makhan Lall.[39] Their Lordships observed that in the present case there was no satisfactory proof of any special custom, therefore, according to Hindu law, the adopted son was entitled to 1/4 of the adoptive father's estate.

The rule in the case of Sudras

In Asita Mohun v Nirode Mohun[40] it was held relying on the authority of the Dattaka Chandrika, that among Kayasthas (who are Sudras) the adopted son and after-born Aurasa son shared equally. Their Lordships observed that according to a text of Vriddha Gautama, the Dattaka and and after-born Aurasa son share equally. The Dattaka Chandrika (V, secs. 29 to 32) says it applies to Sudras only, the Dattaka Mimamsa says it refers to an Aurasa son destitute of good qualities. The Madras High Court following W. Mac-Naghten and Sir Thomas Strange say it is in force among all Sudras of S. India and also in Pondicherry, N. Ceylon and Bengal. Their Lordships quoted a number of cases[41] in support of the authority of the Dattaka Mimamsa and Dattaka Chandrika with the remark that their Lordships could not concur with Knox J. in saying that their authority is open to examination, explanation, criticism, adoption or rejection like any other scientific treatise on European Jurisprudence. Strangein his

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39. (1880) I.L.R. 3 All. 55.

40. (1916) 20 C.W.N. 901, 36 I.C. 127, on appeal to P.C. 24 C.W.N. 794, L.R. 47 I.A. 140.

41. Rungama v Atchama (1846) 4 M.I.A. 1, Sri Balusu v Sri Balusu (1899) 3 C.W.N. 427 (P.C.); Nagindas v Bachoo (1916) I.L.R. 40 Bom. 270, 279 (P.C.) etc.

Hindu Law, p. 99 (Ed. 1830) states "Amongst Sudras the afterborn son and the adopted son share equally the paternal estate", but no authority is cited in support of it and their Lordships thought that it was apparently based on the Dattaka Chandrika. Golap Chandra Sarkar Sastri in his Hindu law (4th edn.) questioned the authority of the Dattaka Chandrika, the work being said to be a literary forgery and according to rumour "Written in support of an adoption case which was pending in the Calcutta High Court". G.S. Shastri says that the rule relating to Sudras was a novel one enumerated for the first time in the Dattaka Chandrika. From this observation the Privy Council observed in the case of Sri Balusu v Sri Balusu[41] that caution was required in accepting its glosses, where it deviated from or added to theSmritis. Equal share between the adopted and Aurasa son was accepted by the Madras High Court in Raja v Subbaraya[42] and quoted by the Privy Council in Nagindas v Bachoo?[31] In Baramanund v Krishnacharan[43] the Calcutta High Court held that para. 25 of Section 5 of Dattaka Chandrika does not apply to Sudras. It was pointed out that in Dattaka Mimamsa, Vols. 40 to 44, Vyavahara Darpana 1042 to 1046, Vyavahara Chandrika (Ed. 1880) Vol. 2, p. 169; Dayakrama Sangraha Ch. VII, Cl. 23, Dayatattwa by Raghunandan, Ch. II, Vol. 37, Dayabhaga Ch. X, Sec. 9, Vol. 13; Vyavahara Mayukha, Mandalik edn. p. 60 and Mitakshara Ch. I, Sec. XII, Vols. 24 to 25, no special rules as to Sudras hadbeen laid down. According to the Dattaka Chamdrika V, 29 to 32, however the Aurasa and adopted son got equal share in the case of

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42. (1883) I.L.R. 7 Mad. 253.

43. (1844) 14 C.L.J. 183.

Sudras, which view was adopted by their Lordships. On appeal to the Privy Council from the decision of the High Court of Bengal, their Lordships of the Privy Council concurred with the decision of the High Court.

I am inclined to think that this decision is not free from doubt and I would agree with the observation of the Privy Council in Sri Balusu v Sri Balusu[41] mentioned above that caution is required in accepting the glosses (of Dattaka Chandrika), where it deviates from or adds to the Smritis. There appears to be no exception in the case of Sudras to the Smriti rule that the adopted son takes a reduced share in competition with an after-born Aurasa son.

In an earlier case,[44] the Calcutta High Court had held that on partition in a Mitakshara family an adopted son and the adopted son of a natural son stood exactly in the same position and each took only the share proper of an adopted son i.e., half the share which he would have taken had he been a natural son. The fact that such an adopted son, a member of a Mitakshara family, becomes upon adoption a joint owner of the family property, will not prevent the operation of the rule. Their Lordships observed that according to Dattaka Chandrika V, 24, 25 an adopted son and an adopted son of a natural son stood exactly in the same position i.e. entitled to half the share of the natural son. The contention that according to the Mitakshara Ch. 1, Pt. ii, V, 25 the sons interest vests as soon as he is born cannot stand as no right vests in any member as long as the family was joint. The same

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44. Raghubanund Doss v Sadhu Churn Doss (1879) I.L.R. 4 Cal. 425.

view was maintained in Debi Prasad v Thakur Dial[45] with the observation that if there was signification of intention then from that moment the interest became both several and defined. In this case,[44] however, as so such intention was expressed in the liftime of the son, their Lordships held that the adopted son was entitled only to 1/6 share. The correctness of this decision was doubted by the Madras High Court in Raja v Subbaraya.[46] Their Lordships of the Madras High Court doubted whether the passage in Dattaka Chandrika V, 25, even with the addition (in Sutherland's translation) suggested by the Calcutta High Court had been eorrectly interpreted. Their Lordships also observed that assuming that according to Mitakshara, the share of an adopted son on partition is limited to one-half of the share which he would have taken had he been a natural son, this rule does not apply to Sudras amongst whom the adopted son is declared to be entitled to an equal share with a legitimate son born after the adoption. By representation the adopted son takes the share which his adoptive father would be entitled to take on partition. The decision in Raja v Subbaraya[46] was dissented from in Narasimhappa v Chinna Kenchappa,[47] wherein it was held that among Sudras, as among twice-born castes, an adopted son was entitled to one-fourth of the share of a natural son subsequently born. Their Lordships observed that the decision in Raja v Subbaraya[46] had been dissented from by the Chief Justice and Seshagiri Aiyar J. in Karuturi Gopalan v Karuturi Venkata[6] where all

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45. (1875) I.L.R. 1 All. 105.

46. (1883) I.L.R. 7 Mad. 253.

47. (1917) 38 I.C. 244, 248.

the authorities had been fully gone into. This latter case was followed by Ayling and Srinivas Aiyangar J.J. in Appeals Nos. 104 of 1914 etc. Their Lordshipa thought they were quite clear that the Chandrikā followed in Raja v. Subbaraya[46] had perverted the ancient texts on this question of the share which an adopted son of a Śūdra father was entitled to. All other Hindu texts both ancient and modern have dissented from the Dattaka Chandrikā and their Lordships were prepared to follow the decision of Sheshagiri Aiyar J. in Karuturi Gopalan's case.[6] I am inclined to agree with this decision. There appears to be no authority in the Smṛitis for son's adopted by Sudras to be treated differently from the twice born classes. Even in the text attributed to Vriddha Gautama, which is considered to be a spurious one, there is no mention that the rule is to be applied to Śūdras only. As such I think there seems to be no textual authority for the special rule for Śūdras.

In a later case Arumilli Perrazu v. Subbarayadu,[48] the Privy Council held that in the case of Sudras in the Madras Presidency, an adopted son, on partition of the family property shared equally with a son or sons of the adoptive father born after the adoption. It was observed by their Lordships that the rule stated in Dattaka Chandrikā (see V, 29, 32) as to the share of an adopted son among Sudras had been accepted and acted on for more than a century in that Presidency until it was disturbed by the decision of the Madras High Court in Karuturi Gopalan v. Karuturi Venkata.[22] Their Lordships observed that the rule, although not supported by the Smritis or by the Mitākshara was not inconsistent with

48. (1921) I.L.R. 44 Mad. 656 (P.C.). This rule has been followed in Bengal and Madras (see above) but rejected in Bombay and Nagpur: Laxman v. Mst. Bayabai A.I.R. 1955 Nag. 241.

them and that the same rule applied among Sudras in Bengal. The earliest authority for the proposition that among Sudras, the adopted and natural son shared equally was the Dattāka Chandrika (V, 29, 32) for among Sudras all sons share equally as against the other castes wherein the shares may be unequal. The Dattaka Chandrika does not state the authority but refers to the text of Vriddhā Gautama which is not accepted by the Indian Courts or the Mitakshara or Dayabhaga as a correct statement of the law applicable to all Hindus. The Dattaka Chandrikā had been accepted as a high authority on adoption as various cases viz. Rungamma v Atchama,[49] The Collector of Madura[50] etc. and by various English authorities. Jolly in Tagore law lectures of 1883 says

> "The Dattāka Mimāmsā and Dattakā Chandrikā have furnished almost exclusively the scanty basis on which the modern law of adoption has been based".

Also it has been stated by Mr. William Macnaghten and Sir Thomas Strange that in the Southern Provinces among Sudras the adoptive and after-born Aurasa son share equally the father's property, which statement, according to their Lordships, was doubtless based on the Dattaka Chandrikā. Their Lordships also referred to the case law on the point. The earliest reported case was in Madras in 1883 viz. Raja v Subbaraya[46] which approved the view of Dattaka Chandrika. The next case was of Gopalan v Venkata[22] wherein it was held that the dictum based on the authority of Dattaka Chandrikā should not be

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49. 4 M.I.A. 1, 102, 7 W.R. (P.C.) 57. (1868)
50. 12 M.I.A. 397, 10 W.R. 17.

followed and stated that Ayyavu v. Niladatchi[51] should have been brought to the notice of their Lordships in Raja's case.[46] As Dattakā Chandrikā was an authority in Bengal where among Sudras the adopted son is given an equal share with an after-born Aurasa son as decided in the cases of Asita Mohan[40] and Barmanund Mahanti[52] and considering the texts of Manu, Yajnavalkya, the Mitākshara and other commentaries their Lordships of the Privy Council concluded that it cannot be said that the Dattakā Chandrikā had in any way deviated from the Smritis. I am unable to agree with their Lordships' decision for reasons mentioned above at p. 189. I think the decision and views expressed in Karturi Gopalan's case[22] lay down the correct law on this subject, i.e.; that in the case of Sudras, as in the case of twice-born castes the adopted son takes a reduced share in competition with an after-born Aurasa son under Shastric law.

Competition between adopted and illegitimate sons.

In the case where there is a competition between an adopted son and illegitimate sons it was held in Maharaja of Kolhapur v. Sundaram Iyer[53] that as between the one adopted son and six illegitimate sons, the former was entitled to 4/7ths and the latter were entitled to 3/7 of the estate. Their Lordships explained and applied the Privy Council decision in Kamulammal v. V. Naicker[54] wherein it was held that an illegitimate son of a Sudra takes half of what he would have taken had he been legitimate. In the case under consideration,[53] as the Raja left 6 illegitimate sons and one son had since been adopted, their Lordships observed that the estate must be divided into 7 shares. The 6 illegitimate sons will get, among themselves, 3/7ths and the adopted son 4/7ths of the

51. (1862) 1 M.H.C.R. 45.
52. (1844) 14 C.L.J. 183; 12 I.C. 6.
53. (1925) I.L.R. 48 Mad. 1, 93 I.C. 705.
54. (1923) I.L.R. 46 Mad., 167 (P.C.).

whole estate i.e., the adopted son was to be treated like a natural legitimate son.

Natural and adopted sons by different wives.

In Gangadhar v Hiralal[55] one S, a Hindu governed by the Mitakshara School of Hindu Law married four wives in succession. In conjunction with his first wife, by whom he had no issue, he adopted a son H. By his second wife, S had a son G born to him. S predeceased his fourth wife M, having had no issue by her. M died intestate. On a suit brought by H, it was held that both H and G were entitled to succeed to M's stridhan property as sapindas of S, and in the absence of any express text curtailing the rights of the adopted son in the circumstances of the present case, H was entitled to share equally with G on the general principle that the adopted son occupies the same position as a natural son and his rights are in every respect similar to those of a natural son. The defendant in this case had based his claim on the texts of Manu (IX, 183) and Yajnavalkya (II, 117, 145). Their Lordships however observed that according to the principle in The Collector of Madura v Mootoo Ramalinga[56] the duty of a European Judge was not so much as to enquire whether a disputed doctrine was fairly deducible from the earliest authorities as to ascertain whether it had been received by the particular shcool of the place. The parties in this case were governed by the Mitākharā (Benares) school. Section XI of the second chapter of the Mitakshara treats of the separate property of a woman.

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55. (1916) I.L.R. 43 Cal. 944, 970.

56. (1868) 12 Moo. I.A. 397, 436.

Manu's text (IX, 183) "if among all the wives ... one has a son, Manu declares them all to become mother's of such son", was, according to their Lordships a misapplication in this case. Kullūka points out that adoption by a childless wife was excluded in such a case and Raghunandana observes this excludes the levirate, which is also the view of Sarvajnanarayana, another commentator of Manu. To the same effect as Manu are Vishnu (XV, 41) and Vasiṣṭha (XVII, 11). Mookherjee J. referred to Lala Jotilal v. Duranikower[57] wherein it was held that the step-mother cannot succeed to the estate of the step-son, which was the law for over half a century. Their Lordships in Gangadhar's case[55] observed that the above argument involved an Atideśa upon an Atideśa i.e., a fiction upon a fiction. According to Mookherjee J. the term son does not include the son of a rival wife although the Vīramitrodaya treats the son of a rival wife as a preferential heir to the husband. Their Lordships concluded that neither of these two were qualified as a son and the estate devolved on sapindas and as these two were sapindas of the same degree they inherited equally.

Punjab custom

Under the Punjab customary law, an appointed heir has been held to succeed equally with a natural son born after the appointment of the heir.[58] But in the case of Khatris of Amritsar it was held, relying on para. 168 of Mayne's Hindu Law, that in provinces which follow the Mitākshara School of Law the adopted son took 1/4 of the adoptive father's estate.

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57. [1864] B.L.R. (F.B.) 67; (1864) W.R. (F.B.) 173.

58. Waryam Singh v. Ishar Singh (1932) I.L.R. 13 Lah. 589; Malagir v. Jagir (1893) P.R. No. 93, p. 371. Rattigan's Digest para. 52.

Present Law:

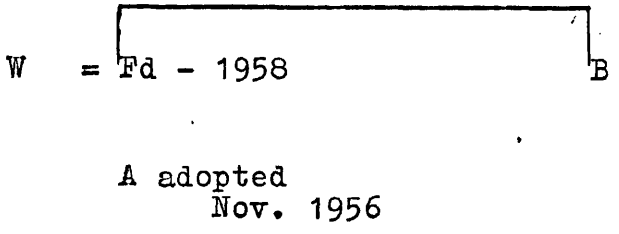
The Smriti law giving the natural son greater rights in competition with the other kinds of sons could possibly have been based on the ground that the natural son is obviously superior to the other kinds of sons and therefore deserved greater rights in the father's property as compared to the other kinds of sons. But the modern trend is to give equal rights to the adopted and the subsequently born natural sons. Section 12 of the Hindu Adoption and Maintenance Act 1956 lays down that

> 'an adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family'.

Thus the section confers on the adoptee the same rights and privileges in the family of the adopter as the legitimate natural son, subject to the proviso in S. 12(a) that the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth. By the use of the words "for all purposes" no distinction between a natural and adopted son is made except as mentioned in the provisos to the section.

Where an adopted son and one Aurasa son share in the property of one who dies before June 1956, the son's share (i.e., a single share vis-à-vis the widow i.e., 1/2 to the son and 1/2 to widow under H.W.R.P.A.) is divided between the Aurasa and the dattaka (an iniquitous rule but traditional). How this works (i.e.; 4/5 x 1/2 to the Aurasa and 1/5 x 1/2

to the dattaka) is shown in Guramma v. Mallappa.[59] Now after June 1956 to Dec. 1956 the same rule applied to the share a son would take in competition with mother, widow, daughter's son, son's son etc. After Dec. 1956 the Aurasa and adoptee count as two sons. However, as rightly pointed out by Derrett,[60] at partitions of Joint-family property the proportions indicated above still apply as far as interests acquired by birth or adoption are concerned, though not in relation to undivided interests which have passed by testamentary or intestate succession under the Hindu Succession Act, 1956. Consider, for example, a Mitakshara coparcenary of members of the 'twice-born' Hindus consisting of F, A and B the brother of F as follows;[60]



A was adopted by F. in November 1956, S was born to W, the wife of F, in 1957. In 1958 F died intestate. A and S separate in 1959. The question is what is A's share (a) as heir and (b) as coparcener.

The share in coparcenary property that would have been allotted to F. at a partition before his death i.e.; 1/8 devolved on W, A, and S in equal shares and each of them would get $\frac{1}{24}$ of the estate. At the partition in 1959 between A and

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59. A.I.R. 1964 S.C. 510. Also see Derrett: Modern Hindu Law (1963 edn.) pp. 122 to 124. See also Venkammammamidi's case (1920) I.L.R. 43 Mad. 398 at p.181 above.

60. Derrett, J.D.M.: Introduction to Modern Hindu Law (1963), para. 186.

S, A takes $\frac{1}{24} + \frac{1}{5}$ x 2/4 (A's and S's coparcenary interest in F's branch) x $\frac{1}{2}$ (interest of F's branch) i.e.; $\frac{1}{24} + \frac{1}{20} = \frac{11}{20}$ of the family estate, while S takes $\frac{1}{24} + \frac{4}{5}$ x 2/4 x $\frac{1}{2}$ i.e.; $\frac{1}{24} + \frac{1}{5} = \frac{29}{120}$ of the same estate. As remarked by Derrett[61] the reduced share of the dattaka enriches only the Aurasa.

Position under English Law

The curtailment of the adopted son's rights of inheritance in the adoptive father's property in competition with a natural son born to the adoptive father after adoption, is peculiar to the Hindu law and does not have a counterpart in any modern legal system. In the English law, the adoption Act of 1926 only transferred the guardianship rights and obligations of the adoptive child from the natural father to the adopter and did not confer on the adopted child any right or interest in the adoptive father's property. But the later Acts of 1950 and 1958 lay down that "the infant shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock".[62] So also in respect of intestacies, wills and settlements the Adoption Acts of 1958 and 1950 (Sections 16 and 13 respectively) lay down that the property (other than entails arranged before the date of the order) devolves in all respects as if the adopted person were the child of the adopter born in lawful wedlock and were not the child of any other person. As to the devolution of entails and estates accompanying a title, Section 16(3) of

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61. Derrett, J.D.M.: Introduction to Modern Hindu Law (1963), p. 124 note 5.
62. Adoption Act, 1958, Section 13(1) last part.

the Adoption Act of 1958, however, expressly excludes from the effects of an order. In such case the property devolves as if Section 16 had not been enacted.

As I have already mentioned earlier this proviso seems to be inequitable and contradictory to the earlier provisions of the Act i.e. Section 13(1) quoted above[62] and also opposed to the considerations of the welfare of the child, which factor is an important basis of the English adoption law.

CHAPTER V

THE ADOPTED SON'S RIGHT TO SUCCEED COLLATERALLY

Views of Text writers

A perusal of the Smṛiti texts would show that almost all the Smṛiti-writers recognize the right of the adoptive son to succeed to the property of the adoptive father. However, as regards the right of an adoptee to succeed collaterally there appears to be a conflict between the Smṛitis: According to one group the adopted son inherits both to the adoptive father and to his kinsmen, whilst according to the other group he inherits only to the adoptive father. The commentators tried to reconcile the conflicting Smṛiti texts by explaining that the possession of good qualities will entitle the adopted son to inherit from his adoptive father and from his kinsmen, otherwise he will inherit only from his adoptive father. Thus Manu (IX, 158-160), Brihaspati (3 Dig. 162-171), Gautama (XXVIII, 32-33), Baudhāyana (II, 2, 10-23), the Kālikā Purāna (3 Dig. 155) and the Brahma purāṇa (3 Dig. 174) place the dattaka in the former group whilst Yājñavalkya (ii, 128-132), Vishṇu (XX, 1-27), Nārada (VIII, 45-46), Śaṅkha and Likhita (3 Dig. 151), Devala (3 Dig. 153), Hārīta (3 Dig. 152) and Yama (3 Dig. 154) place him in the latter group. The views of the Smṛiti-writers and the commentators have been discussed above.[1]

In a Dayabhaga case, Puddo Kumaree Debee v Juggut Kishore Acharjee,[2] the P.C. affirmed the decision of the

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1. See ante pages 103 to 108.

2. (1880) I.L.R. 5 Cal. 615, 630; affirmed by P.C. in (1882) I.L.R 8 Cal. 302; 8 I.A. 229.

Calcutta High Court that the rights of an adopted son (including the right to succeed to the Sapinda kinsmen of the adoptive father) are in every respect similar to those of a natural born son unless curtailed by express texts. Mitter J. of the Calcutta High Court opined that gotra-dayadas includes all sapindas whether of the bhinna-gotra or samāna-gotra. He referred to the Dattaka-Mīmāṃsā[3] and Dattaka-Chandrikā[4] to show that there was no difference between a dattaka and a natural son in matters of succession to the property of his adoptive father's collaterals. Further His Lordship explained that the contention that V. 8 of Chapter X of the Dāyabhāga supports the conclusion of the lower court was not true as a careful examination of V. 7 would show. The same text of Devala (as referred to in the Dattaka Mīmāmsā and the Dattaka Chandrikā) recites the different sons and classifies them in the order (i) the son begotten by a man himself (ii) procreated by another (iii) the son received and (iv) the son voluntarily given. After having classified them in this manner the text says "Among these the first six are heirs of kinsmen, etc." The "first six" refers to first six according to the classification immediately preceding and not according to the recital of different descriptions of sons given in an earlier portion of the text (wherein the dattaka is ninth on the list). Also in a note by Srī Krishna Tarkā-lankāra a similar classification is given which is as follows:[5] "Issue begotten by a man himself" comprises (i) the Aurasa or

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3. D.M.S. III, 1, SV, 28; SVI, 53, 32, 38, 39, 50 to 52.

4. D.C. V 22; III, 16-18.

5. Stokes Hindu Law Books, p. 300.

real son (ii) son by a twice married woman (iii) son of a Brahmin by a Śūdra woman (iv) an 'appointed' daughter. "Issue procreated by another man" intends the son of the wife and so forth. "Sons received for adoption" are (i) Datta, a son given (ii) Krīta, on bought (iii) son of a pregnant bride (iv) son born of an unmarried damsel (v) Kṛitrima son by an arrangement between two parties. "Voluntarily given" signifies presented unsought comprising (i) son rejected (by his own parents) (ii) one who comes of his own accord (iii) a son secretly produced.

According to this classification also, it would be seen that the dattaka son falls within the first six. Their Lordships of the Calcutta High Court also referred to the case of Sumbhoo Chunder v Naraini Debee[6] wherein the P.C. had held that the doctrine that the adopted son is not an heir to collateral relations is in opposition to Manu's text and on fuller consideration of the Dāyabhāga, the views of the Mitākharā and the opinions given by Pundits of the Court, came to the conclusion that according to Hindu law, an adopted son succeeds, not only lineally, but collaterally to the inheritance of his adoptive father's relations. Jagan-nātha in his Digest[7] expressed the same view. Their Lordships of the Calcutta High Court therefore held that an adopted son is an heir to kinsmen as well as to his own adoptive father.

Dattaka inherits to collateral in Mithila also

In the case of Chandreshwar Prasad v Bisheshwar

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6. (1835) 5 W.R. 100 (P.C.).

7. Vol. III, pp. 270-273.

Pratap[8] their Lordships of the Patna High Court held that a dattaka son in the Mithilā school inherits to collaterals. Their Lordships opined that the dattaka son is recognised in the Mitākharā and under the Mitākharā the dattaka inherits to collaterals. The question was how far the Mithila school departed from the Mitākharā. Under the Mithilā school, due to the interpretation of Vaśiṣṭha's text a widow cannot adopt and therefore the Kṛitrima son is the consequential innovation by Brahmins.[9] Their Lordships remarked that there was nothing to show that the dattaka was obsolete in Mithilā and the question was whether the dattaka inherits in Mithilā.

Their Lordships referred to the views of Vāchaspati Misra, who did not adopt the distinction (i.e. the classification into Bandhudāyādas, etc.) between "succedaneous" i.e. 'secondary' and "non-succedaneous" sons. After referring to Manu and Baudhāyana, both of whom place the adopted son amongst the first six and to Devala, he deals with the texts of Vishṇu and Yājñavalkya who make no distinction between "succedaneous" and "non-succedaneous" sons. Vāchaspati Miśra interprets Yama and Nārada (according to whom the first six sons in the respective lists inherit to the adoptive father and his collaterals and the latter six only to the adoptive father), as "on default of each preceding, the next succeeding in order is entitled to the property" and places the adopted son seventh in the list, entitled to the inheritance in default of the first six. Their Lordships of the Patna High Court therefore

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8. [1926] I.L.R. 5 Pat. 777, 846 et seq.

9. Also see Derrett: Introduction to Modern Hindu Law (1963) P. 200 and A.I.R. 1963 Pat. 362. (Umesh Bhagat v Smt. Ram Kumari).

held that the dattaka in the Mithilā school is capable of inheriting to the collaterals of his adoptive father.

The English writers F. and W.H. Macnaghten are also of the opinion that an adopted son succeeds both lineally and collaterally.[10]

Manu makes the transfer of the adopted son from the natural family to the adoptive family complete by declaring that "an adopted son shall never take the family name and the estate of his natural father ... the funeral oblations of him who gives his son in adoption cease as far as that son is concerned".[11] The Dattaka Mīmāmsā and the Dattaka Chandrikā expressly lay down that the dattaka is a substitute for a real legitimate son both for purposes of inheritance and for purposes of funeral oblations and that he is a sapiṇḍa to the members of the adoptive family and that the forefathers of his adoptive mother are his 'maternal grandsires'.[12]

Opinions of Courts in Dayabhaga cases

As observed in Joy Kishore v Panchoo[13] there is no difference as regards Sapiṇḍa relationship between the adopted and the natural born son. An adopted son inherits as heir the estate of a natural son in virtue of his adoption, though made after the latter's decease (by the adoptive step-mother in this case).[14] In Kishennath v Hureegobind[15] the question to

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10. F. Macnaghten 128-132; 1 W. Nacnaghten p. 78; 2 W. Macnaghten 178.

11. IX, 142.

12. Dat. Mim. VI, 50-53, Dat. Ch. III, 17, 20, v. 24.

13. Joy Kishore v Panchoo (1879) 4 C.L.R. 538.

14. Joy Chundro v Bhyrut Chundro (1849) S.D. 461. Also in

F/notes contd. on next page

be determined was whether the heir of an adopted son could succeed collaterally. The Sudder Diwany Adaulat referred to the decisions of the court reported in Vol. VI of the Select Reports 'P'. 203, and Vol. I 'P' 209 and the doctrine laid down in Macnaghten's Principles of Hindoo Law, Vol. I, p. 78 and in Sutherland's translation of the Dattaka Chandrikā, p. 202 and held that an adopted son is entitled to succeed collaterally and the appellant being the son and representative of such adopted son, was entitled to succeed to the rights and interests of his father in the property, whatever they may be. So also the adopted son succeeds to the property of his adoptive father's brother, and in Bengal, where the Dāyabhāga prevails, an adopted son succeeds collaterally, as well as lineally, in the family of his adoptive father.[16] In this connection their Lordships of the S.D. Court refer to the following observation of W.H. Macnaghten in his Principles of Hindoo Law (Vol. I at 'P' 78)

> "Another point which has been the subject of much discussion is as to whether an adopted son by the dattaka form succeeds collaterally as well as lineally, but this may now be fairly said to be set at rest and decided in the affirmative. It is true that Jimutavahana in the Dayabhaga has contended that the son adopted in the dattaka form cannot succeed to the property of his adoptive father's relations, but the doctrine being in opposition to the text of Menu, cannot be held entitled to any weight".[16a]

Footnotes contd. from previous page

Shamchander v Narayni (1807) 1 S.D. 279 it was held that an adopted son succeeds collaterally as well as lineally in adoptive father's family (1835) 5 W.R. 100 (P.C.) followed in Gourhuree v Mt Rutnasuree (1837) 6 S.D. 250.

15. [1859] S.D. 18.

16. Lokenath v Shamasoonduree [1858] S.D. 1863; Gooroopershad v Rashbehery [1860] I S.D. 411.

16a. However according to Justice Mitter's interpretation of Dāyabhāga X, 7 & 8 (see PP. 199-200) an adopted son is entitled to succeed collaterally.

In Guru Gobind v Anand Lal[17] (another Dayabhaga case) it was held that, on the theory of spiritual benefit the adopted son of a paternal uncle's daughter is entitled to be recognised as an heir according to the Hindu law current in the Bengal school, even though not specifically mentioned in the Dāyabhāga. For under the Dāyabhāga the principle recognised is that of spiritual benefit on which the Hindu law of inheritance is essentially based. The text of Manu ('To the nearest Sapinda, male or female, the inheritance belongs'.) is interpreted by the Dāyabhāga - the nearest heir is he who is competent to confer benefit on the soul of the deceased proprietor. The power of the widow (being half of her husband's body) to confer spiritual benefit commences from the date of the death of her husband whereas the son, grandson and great grandson confer such benefit from the moment of their birth,[18] hence the latter are preferred to the former in matters of succession under the Dāyabhāga. The next exception is the daughter because she can confer great spiritual benefit by giving birth to a son who will deliver him and his ancestors from hell, hence childless daughters are excluded from the line of inheritance. The male heirs are divided into (a) Sapiṇḍas (b) Sakulyas (c) Samānadokas and (d) specified strangers, from spiritual preceptor to learned Brahmins. On this theory of spiritual benefit the paternal uncle's daughter's son is one of his sapiṇḍas and

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17. [1870] 5 W.R. Ben. 15 (F.B.).

18. Dāyabhāga, Ch. XI, S. 1, V. 43 quoted in the case. For Dāyabhāga succession see Sarvadhikari Principles of Hindu law of Inheritance p. 657 et seq, Kane: History of Dharmasastra, Vol. III, p. 734 ff and Derrett: Introd. to Modern Hindu Law paras 614 to 618. Also PLD 1967 Dacca 745 must now be taken into account. (Rabindranath v Narayan Chandra)

hence a preferable heir in this case. Sapiṇḍas are those that are entitled to offer oblations to a common ancestor, and the son of paternal uncle's daughter, even though not specifically mentioned in the Dāyabhāga, is a sapiṇḍa. The great majority of them have been left to be determined by the application of principles of spiritual benefit.

Dattaka inherits collaterally - Mitākshara cases

Under the Punjab customary law it has been held that the adoption of a daughter's son is valid[19] and that, as soon as adopted, the adopted son becomes a coparcener with the adoptive father and the latter cannot dispose of any joint family property. But this was a case in Mitakshara law and not actually in Punjab customary law.

The Privy Council observed in the case of Sumboo Chunder v Naraini Dibeh[20] that the adopted son of the whole blood was in the same situation as a natural son of the whole blood and that according to the authorities a brother of whole blood succeeds in preference to one of half-blood. According to the Dāyabhāga, Colebrooke's principles of Hindoo Law p. 177,[20a] Sutherland's Synopsis p. 219, the Mitākshara and the opinions given by Pundits of the Court, the adopted son succeeds not only to the adoptive father but also succeeds collaterally. Their Lordships therefore held that the adopted son of a full brother had a preferential right to succeed over that of the real son

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19. Parmanand v Shiv Charan Das [1921] I.L.R. 2 Lah. 69; 59 I.C. 256; Kirpa Ram v Rabi Datt [1924] I.L.R. 5 Lah. 134; Rup Narain v Gopal Devi [1909] I.L.R. 36 Cal. 780 (P.C.).

20. (1835) 5 W.R. (P.C.) 100; 3 Knapp, P.C. 55.

20a. Colebrooke's Digest with commentary by Jagannatha London 1801, Vol. III, Chapter IV, art. 257, P. 270.

of a half brother. Following this decision it was held in Taramchun v. Kripa Moyee[21] that the adopted son is entitled to the share of his father in the property of kinsmen and when he comes to share with heirs other than the Aurasa son his share remains unaffected vis-a-vis the other relations as he represents his adoptive father and is entitled to his share. Hence an adopted son shares equally with natural relations of the same degree to the property of a distant collateral (in this case to the property of the first cousin of his adoptive grandfather).

In Padmakumari v. Court of Wards[22] it was held that an adopted son succeeds to his father's sapindas, whether related through males or through females just as if he were a real son. This case has been discussed at p.388 which may be referred to.

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21. (1868) 9 W.R. 423; approved by the Privy Council in Nagindas v. Bachoo (1915) 20 C.W.N. 703 18 Bom. L.R. 172.

22. (1882) I.L.R. 8 Cal. 302 P.C. + 8 I.A. 229.

The doctrine of the Dayabhaga 10, 8 that the adopted son is not an heir of collateral relations (Sapindas) which is in opposition to Manu's text had been considered by the P.C. in Sumbhoochunder v Naraini Dibeh[20] and held that the adopted son succeeds not only lineally but collaterally to the inheritance of his relations by adoption.

So also in Kali Komul v Uma Shunker[23] the P.C. affirmed the view of the Calcutta High Court that the succession of an adopted son to the relatives of the adoptive mother was in the same way as a legitimate son. Following the decisions in Kali Komul v Uma Sunker[23] and in Padmakumari v Court of Wards[22] it was held in Radha Prasad v Ranee Mani Dassee[24] that an adopted son holds precisely the same position as a son born as regards inheritance from the adoptive mother's relations and that the status of an adopted son, unless modified by express texts, is similar to that of a son born, as regards the performance of periodical obsequial ceremonies and inheritance. It would appear that the adopted son's right to succeed to 'Bhinna-Gotra' sapindas seems to be recognised by Courts of law on the negative ground that no text lays down that the adopted son cannot succeed to the estate of relations of the adoptive parents sprung from a different family. In Teencowree v Denonath[25] it had been held that an adopted son had all the rights and privileges of an Aurasa son and was also

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23. In the H.C.: (1880) I.L.R. 6 Cal. 256; in the P.C. (1883) L.R. 10 I.A. 138.

24. (1906) I.L.R. 33 Cal. 947 F.B.

25. (1865) 3 W.R. 49.

entitled to succeed to the Stridhana[26] of his mother in the absence of daughters, in like manner as a son born, whether there be or be not a will in his favour. Also a son adopted by one wife may succeed to a co-wife's stridhana. In Dattatraya v Gangabai[27] it was held that a son's daughter's adopted son is a preferential heir to the late owner's sister's daughter. In this case both the contestants were Atmabandhus and the only test to determining heirship was propinquity to the propositus (none of these were mentioned in the Mitakshara or the Mayukha which list was considered as illustrative and not exhaustive).[28] According to Shah J. the test of religious efficacy was not a safe guide and not of assistance in determining nearness of blood relationship in the case of distant relations as in the present case. The contention that the defendent was an adopted son and could not take the place of a natural son was overruled in view of the decision in Kali Komul v Uma Shunkur.[29] According to Shah J. in the case of bandhus equally removed from the propositus, one in direct line of descent should be preferred to one in a collateral line and the son's daughter's son is a nearer bandhu to the sister's daughter though they are both equally removed from the

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26. Refer Kane: History of Dharmasastra, Vol. III, p. 770 ff. for a discussion on Stridhana.

27. (1922) I.L.R. 46 Bom. 541.

28. As held in Mohandas v Krishnabai (1881)/5 Bom. 597 and Parot Bapalal v Mehta Harilal (1894) 19 Bom. 631, that propinquity is the sole test and the former case preferred Atma bandhus not mentioned in Mitakshara to one mentioned in Mitakshara - confirmed by P.C. in Adit Narayan v Mahabir Prasad (1921) L.R. 48 I.A. 86 and Vedachala v Subramania (1921) L.R. 48 I.A. 349. For rules of Mitakshara succession refer to Derrett: Modern Hindu law (1963) p. 381 et seq.

29. Uma Sankar v Kali Komul (1884)/6 Cal. 257 approved by P.C. in Kali Komul v Uma Shunkur (1883) L.R. 10 I.A. 138.

propositus.

In Nagindas v. Bachoo[30] it has been held that the adopted son has the same rights as a legitimate son except in competition with an after-born legitimate son of the father, in which case his share is reduced. The only question in appeal in this case was whether the appellant (as a member of the joint family by adoption) took on partition a share equal to that of the respondent (a member by birth) or a reduced share. Their Lordships of the P.C. were of the opinion that the learned judges of the High Court had put a wrong interpretation on V. 24, 25 of the Dattaka Chandrikā. The Dattaka Mīmāṁsā in 10, 1 adds "On the death of him (the natural born son) he (the adopted son) is entitled to the whole". Both Vasiṣhtha and Nanda Pandita were referring to competition between an adopted and after-born legitimate son and not to competition between an adopted member of one family and natural son of another. What the Dattaka Chandrikā meant was that the adopted son would share equally with his uncle whilst an adopted son of adopted son cannot take a greater share than his father in competition with an uncle naturally born. Raghubanand Doss v. Sadhu Churn[31] was wrongly decided, and an opposite view was taken in Tara Mohun v. Kripa Moyee[32] which was followed in Dinanath Mukherji v. Gopal Churn[33] and Raja v. Subbaraya[34]. Their Lordships of the P.C. doubted whether

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30. (1916) I.L.R. 40 Bom. 270.
31. (1879) I.L.R. 4 Cal. 425.
32. (1868) 9 W.R. 425.
33. (1881) 8 Cal. L.R. 57.
34. (1883) I.L.R. 7 Mad. 253.

V 25 of Dattaka Chandrikā had been correctly construed by the High Court in Sumboo Chunder v. Naraini[35] it was held that the adopted son becomes for all purposes son of the adoptive father which view was approved in Padma Kunari v. Court of Wards[36] that the adopted son succeeds lineally and collaterally and occupies the same position as a natural son except in respect of marriage and in competition with an after-born son of the adoptee.

It is a canon of interpretation in Hindu Law that a special text forming an exception to a general text should be construed strictly and applied only to the cases falling clearly within it.[37]

In Anandi v. Hari Suba[38] it was held that under the Mitākshara school of Hindu law the adoptive mother is entitled to succeed in preference to the adoptive father, to a son taken in adoption. According to the Mitākshara, when a son dies leaving his parents as heirs, the mother succeeds to the son's estate before the father. Vijñānesvara prefers the mother on two grounds (as West J. observed in Lallubhai v. Mankuvarbai[39]) (a) that the word pitarau is abbreviation of the conjunctive compound mātāpitarau (parents) in which the word mātā comes before Pitā; (b) that the mother's propinquity is greater than

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35. (1835) 5 W.R. 100 (P.C.).
36. (1882) I.L.R. 8 Cal. 302.
37. (1908) I.L.R. 32 Bom. 275 (Gangu v. Chandrabhagabai).
38. (1909) I.L.R. 33 Bom. 404, 409, 3 I.C. 745.
39. 1876 I.L.R. 2 Bom. 388 at p. 439.

the father's. Their Lordships remarked that no doubt propinquity does enter the reasoning of Vijnanesvara, but it does not, on that account, follow that he intended to deny the same propinquity to an adopted son which he allows to a natural-born son.

In Gangadhar v. Hiralal[40] it was held that both an adopted son (adopted by the husband in conjunction with his first wife) and a natural son (by a co-wife) were entitled to succeed to the mother's (fourth wife's) strīdhana property as sapindas of the adoptive father. This case has been discussed at p.192 which may be referred to.

In Mokundo Lall Roy v. Bykunt Nath[41] the adopted son was held entitled to succeed to the third cousin of his adoptive father and in Maharaja of Kolhapur v. Sundaram Ayyar[42] it was held that the adopted son of a daughter's adopted son is a better heir than the father's sister's son's son.

Inheritance from an adopted son.

In Annapurni v. Collector of Tinnevelly[43] the Junior wife, having taken part in the adoption was held entitled to the impartible estate in preference to her co-wife. As to

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40. (1916) I.L.R. 43 Cal. 944. 970 F.B.
41. (1881) I.L.R. 6 Cal. 290.
42. (1925) I.L.R. 48 Mad. 1, 221-3.
43. (1895) I.L.R. 18 Mad. 277.

Manu IX, 183 that, 'if among all the wives of the same husband, one brings forth a male child, they are all declared by means of that son, to be mothers of male issue', nevertheless the actual mother succeeds to the son in preference to her co-wives, similar is the case of the wife associated with the adoption.

In Tewari Raghuraj v Subhadra,[44] a case relating to the rules of succession under Act 1 of 1869 (the Oudh Estates Act), and the amending Act 3 of 1910, Viscount Sumner observed in the Privy Council that consideration of the intimate connection which primitive Hindu laws established between the funeral offerings and ceremonies on behalf of the dead and the right of succession to his property will show that ceremonially the adopted son only becomes new born in the family of his adoptive father, so as to be qualified to provide efficaciously the offerings of which the dead have need, by first dying in the family of his birth, out of which he is given by his natural to his adoptive parent, and in which his offerings will be no longer efficacious or desired. Therefore, when such an adopted son dies, his natural brother cannot succeed to him to his estate in the adoptive family being still a member of the family of his birth and bound to make the necessary offerings for his own ancestors and thus not qualified to do the same thing for his brother and his adoptive father and that father's immediate predecessors.

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44. A.I.R. 1928 P.C. 87. Also see Derrett: Introduction to Modern Hindu Law (1963) para. 182.

Adoption after succession has opened

It may however be pointed out here that, granted that collateral rights of succession were secured by an adoptee prior to the HAMA, it was requisite that the adoption should have occurred before the succession opened.

In Kally Prosonno Ghose v Gocool Chunder[45] it was decided that a subsequent adoption, after the succession has opened, cannot confer on the adopted son the right to succeed collaterally and to divest property already vested in the heir of the deceased. A similar rule had been declared by the Sudder Dewany Adawlat in the case of Keshub Chunder v Bishnu Pershad[46] and recognised by the Privy Council in Bhoobun Moyee v Ram Kishore.[47] So also in Nilcomul Lahiri v Jatendra Mohun[48] it was held that the right to succession is a right which vests immediately on the death of the owner of the property, and cannot, under any circumstances, remain in abeyance in expectation of the birth of a preferable heir not conceived at the time of the owner's death (or in anticipation of the adoption of a son). As to the question whether the defendant was estopped by his fraud as a result of which the adoption of the Plaintiff was delayed until after the death of the owner of the property, their Lordships remarked that in this case the adopted son was not even in existence when the fraud was committed by the defendant, hence it was of too remote a character for the Court, as a court of equity, to disturb

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45. (1879) I.L.R. 2 Cal. 295.

46. S.D.A. for 1860, ii, p. 240.

47. (1865) 10 Moo I.A. 279.

48. (1881) I.L.R. 7 Cal. 178.

the estate which naturally vested in the defendant as the sole heir of the owner at the time of her death. This was affirmed by the Privy Council in Bhubanewari v. Nilcomul[49] wherein it was decided that an adopted boy could not claim to share along with the nephew the estate which had belonged to the uncle, notwithstanding the nephew's conduct in reference to the exercise of the power to adopt, inasmuch as the date of this boy's birth rendered it impossible for him under any circumstances to have been made an adoptive heir to the uncle. Their Lordships remarked that the widow never could by adoption, if there had been no fraud, have made the plaintiff a reversionary heir of half the estate because he was not in existence at the time of the owner's death and according to the law as laid down in decided cases, an adoption after the death of a collateral does not entitle the adopted son to come in as an heir of the collateral.

Position under Punjab customary law.

In Mela Singh v. Gurdas[50] it was held that in case of an appointment under the customary law of the Punjab the relationship established between the appointed heir and the appointer is purely a personal one[51] and resembles the Kritrima form of adoption under the Hindu law.[52] In this case 'A' a Jat of Hoshiarpur appointed 'B' his heir according to the custom of the tribe. B died in the lifetime of the appointer and the latter died later. B's son claimed the estate of 'A' but was resisted by A's collaterals. Their Lordships held that B's son

49. [1886] I.L.R. 12 Cal. 18.

50. [1922] I.L.R. 3 Lah. 362 (F.B.)followed in Indar Singh v. Gurdevi, A.I.R. 1930 Lah. 897.

51. Article 49 of Rattigan's Digest of Customary Law.

52. For incidents of the Kritrima adoption see pages 514 et seq.

could not succeed to the estate of A. Their Lordships referred to Article 49 of Rattigan's Digest of Customary Law and observed that the appointment under the Punjab Customary Law only affected the parties thereto and the appointed heir did not become the grandson of the appointer's father and his son did not become the grandson of the appointer. Their Lordships referred to various cases, among them being Tulsi v. Ram Rakha[53] wherein a similar observation was made that in a case of customary appointment of an heir the appointment is personal to the appointer and does not operate to make all his relatives or even his existing sons, members of the agnatic family of the adopter. In Chajju v. Dalipa, [54]however, it was held that by custom among Mahtons of Nawashahr Tahsil, in the Jullunder District, the sons of an appointed heir who pre-deceased his adoptive father were entitled to succeed on the latter's death to his estate. Kensington J. observed that even though the relationship set up by appointment of an heir described in paragraph 49 of Customary Law as purely personal, there was no sufficient ground for extending this dictum so as to meet a case not specifically dealt with in the paragraph. Chajju v. Dalipa[54] was however over-ruled by the Full Bench in Mela Singh v. Gurdas[50] Reference was also made to the case of Mehra v. Mangal Singh[55] wherein it was observed:

> "It has been held in many cases that the appointment of an heir is tantamount to a gift which comes into operation on the death of the appointer and that the property received by the appointee should be regarded in the nature of a bequest."

(i.e., it is not ancestral qua the latter's son). The tie of

53. (1908) No. 66 P.R. 314 (at p. 315).
54. (1906) No. 51 P.R. 197 (at p. 199).
55. (1915) 27 I.C. 393.

kinship with the natural family is not dissolved and the fiction of blood relationship with members of the new family has no application to the appointed heir, the relationship being a purely personal one.

Their Lordships distinguished the case from Waryaman v. Kanshi Ram,[56] in which case it was held that in the case of an adoption made under the customary law of the Punjab it is to be determined whether it was intended that the adopted boy should be altogether taken out of his natural family and introduced into the adoptive father's family as his son, in other words, whether the adoption was a complete adoption having the effect of severing the connections of the boy with his natural family.

In the case of an adoption in a particular community, where there is no standard of formality and no precise customary rule as to what is to be done to produce all the effects of adoption, all that can be said is that where the adoption is as complete as an adoption in that community ever is, and where the intention to make a complete change of family is manifested there the right of collateral succession may be presumed till the contrary is shown. Uttam Singh v. Wazir Singh[57] was followed. In that case Powell, J. observed:

> "There is no doubt a sense in which all Jat adoptions may be said to be 'informal', and that is perhaps the sense in which the term was at first used. Where the parties were not governed by the Hindu law-books (which gave names to different kinds of adoption, and prescribed certain conditions regarding age, relationship and religious and social ceremonies) and where they adopted in a different way, as all Jats do, the adoption

56. (1922) I.L.R. 3 Lah. 17, 66 I.C. 309.
57. (1887) No. 84 P.R. 175 (177).

> is, qua the law-books, 'informal'. But there can be also no doubt that passages may be quoted in which even among such adoptions as Jats practice, a distinction may be drawn between those that are 'formal' and those that are 'informal'. For instance where the child is taken at an early age, the brotherhood assembled, sugar distributed, and when after that the child is brought up and treated as a son of the house betrothed, married, and associated in the cultivation, and allowed to perform the funeral ceremonies then the adoption is "formal"".

Commenting on this case Kapur observes that the nature of an adoption is not to be inferred from the intention of the adopter but from the recognised custom of the place and the tribe and if that is established a man will succeed collaterally otherwise not, in spite of the intention of the adopting parent, which cannot create any relationship between the collaterals of the adopting father and the adoptee.[58] It is indeed difficult to comment on adoptions not made according to the rules laid down in the Smritis, as adoption is an institution created by the Smritis it should be governed according to the Smriti law. It would appear from this and other cases that the test of formality seems to be the intention to make a complete change in the family which may be manifested by the actions of the adopter.

As observed in Mutsaddi v. Naraina[59] the general custom among Punjab Agriculturists is that an appointed heir does not succeed collaterally in the family of the person who appointed him, the reason being that he does not lose the right of collateral succession in his natural family. So where by custom such heir does not succeed collaterally in his real father's family, his right of collateral succession in the adoptive father's family is very often recognised. Where custom does not recognise a right of collateral succession

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58. The Law of Adoption (1933 edn.) p. 444: J.L.Kapur.
59. (1914) No. 40 P.R. 142; (1914) 24 I.C. 894.

in his natural family, that custom would recognise his right to collateral succession in the appointer's family. So also in Jagat Singh v Ishar Singh[60] it was held that a person appointed an heir under the Punjab Customary law is not debarred from succeeding collaterally in his natural family in the presence of his natural brothers, although he cannot compete with them in the matter of succession to the estate of his natural father. Their Lordships observed that it was repeatedly laid down that the customary appointment of an heir does not involve the transplanting of the heir from one family to another. The tie of kinship with the natural family is not dissolved and the fiction of blood relationship with members of the new family has no application to an appointed heir. The relationship established between the appointer and appointee is a purely personal one and does not extend beyond the contracting parties on either side, vide, Mela Singh v Gurdas.[61] Hence he does not lose his right of succession in that family. His appointment as heir, however, confers upon him the right of succeeding to the estate of the adoptive father and it was therefore considered unjust that he should be allowed to compete with his natural brothers in the matter of succession to the estate of his natural father, on grounds of equity and justice and an exception was grafted on the general rule allowing him to succeed in his natural family. This has no application to the case of succession to the estate of collaterals in the natural family because an appointed heir has no right of succession to collateral

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60. [1930] I.L.R. 11 Lah. 615, 618, 620.

61. (1922) I.L.R. 3 Lah. 362 (F.B.).

relatives of the appointer. A similar observation was made in Inder Singh v. Kartar Singh[62] which is discussed at p. 87-8above.

On the question whether the rules relating to ceremonies and preferences in selection of the child laid down in the Riwaj-i-am were mandatory, their Lordships of the Supreme Court observed in Hem v. Harnam[63] that whether a particular rule recorded in the Riwaj-i-am was mandatory or directory must depend on what was the essential characteristic of the custom. Under the Hindu law adoption was primarily a religious act intended to confer spiritual benefit on the adopter and some of the rules had, therefore, been held to be mandatory and compliance with them was regarded as a condition of the validity of the adoption. On the other hand, under the customary law in the Punjab, adoption is secular in character, the object being to appoint an heir and the rules relating to ceremonies and to preferences in selction have to be held to be directory and their Lordships rightly held that adoptions quoted from Mulla's Hindu Law (Eleventh edn. p. 541) which says:

> "It has similarly been held that the texts which prohibit the adoption of an only son, and those which enjoin the adoption of a relation in preference to a stranger, are only directory, therefore the adoption of an only son, or a stranger in preference to a relation, if completed, is not invalid. In cases such as the above, where the texts are merely directory, the principle of factum valet applies, and the act done is valid and binding".

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62. A.I.R. 1966 Punj. 258.

63. A.I.R. 1954 S.C. 581.

Their Lordships observed they saw no reason why a declaration in the 'Riwaj-i-am' should be treated differently and the text of the answer should not be taken to be directory. Their Lordships further observed that however peremptory may be the language used in the answers given by the narrators of the custom, the dominant intention, underlying their declarations which was to confer a temporal benefit upon one's kinsmen should not be lost sight of. Simialr views were held in Jiwan v. Pal,[64] Sant Singh v. Mula,[65] Chanan v. Buta[66] and Jowala v. Dewan Singh[67].

In this connection it may be pointed out here that in the customary adoptions in the Punjab, like the Kritrima adoption, the relationship between the appointer and the appointed heir is a purely personal one, the main object being to appoint an heir. As such the non-compliance with any directory conditions should not affect the validity of the adoption once the appointment is an accomplished fact.

In the case of adoptions in Karnal and Rohtak districts and other parts of Old Delhi territory, the Hindu conception of adoption prevails and the adoption is not governed by the rule applicable to mere customary appointment of an heir such as is usually met with in the Punjab proper. The result is that the adopted son is completely severed from the natural family and becomes a member of the adoptive family. [68] This rule was laid down with respect to Jats of Rohtak District in Mansa v. Surta[69] and Giasu v. Har Dial (Jats of Gurgan District)[70] and approved in Juglal v. Jot Ram.[68]

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64. (1913) P.R. No. 22 p. 84.
65. (1913) P.R. No. 44 p. 173.
66. A.I.R. 1935 Lah. 83.
67. A.I.R. 1936 Lah. 237.
68. Juglal v. Jot Ram (1930) I.L.R. 11 Lah. 624.
69. Mansa v. Surta (1909) No. 99 P.R. 490 (Jats of Rohtak Dist.)
70. Gissur v. Har Dayal (1921) 59 I.C. 82 (Hindu Jats, Gurgaon District.).

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In Giasu v Har Dayal (a case of Hindu Jats from Gurgaon District) it was observed that the customary appointment of an heir is almost unknown in the districts which formed part of Old Delhi territory, hence the presumption that the adoption was a formal one, arises. As pointed out in Mansa v Surta,[69] a judgment dealing with adoption among Jats of Rohtak District

> "in the Rohtak District in common with other parts of the Old Delhi territory, adoption, when effected, is of a formal nature and not the mere customary appointment of an heir such as is usually met with in the Punjab proper; and the adopted son merges in his new family".

So also where the adoption was proved to have taken place among Jats of the Gurgaon District the presumption was that the adoption was a formal one. It was held that the adoption being a formal one, the defendant must be regarded as a male lineal descendant of the deceased owner of property, within the meaning of S. 59 of the Punjab Tenancy Act of 1887. So also in Sabhachand v Piare Lal,[71] a full bench of the Punjab High Court decided that a son formally adopted under the Hindu law is a "male lineal descendant" of his adoptive father within the meaning of S. 59 (1)(a) of the Punjab Tenancy Act of 1887 and also that a person belonging to the districts of old Delhi territory whose adoption, though prohibited by Hindu law, is valid under custom which gives such an adoption the full effect of a formal adoption under Hindu law, must be regarded as a "male lineal descendant" within the meaning of S. 59 of the same Act. In arriving at this conclusion their Lordships observed that the answer depends upon the interpre-

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71. (1930) I.L.R. 11 Lah. 481, 499.

tation of the expression "male lineal descendants" occurring in S. 59 of the Punjab Tenancy Act 1887. The expression 'lineal descent' is explained in Wharton's Law Lexicon as "descent of an estate from an ancester to 'heir' in a right line. The word 'heir' presumably is to be interpreted with reference to the personal law of the party and prima facie there was no good reason why an adopted son should not be looked upon as a 'male lineal descendant' in the same way as a son born of lawful wedlock. The expression 'lineal descendant' obviously does not include 'illegitimate' descendants and should be taken as equivalent to 'legitimate lineal descendants' determined from the personal law of the party. The institution of adoption occupies a unique place in Hindu law - it severs the adopted son from the natural family, transplants him into the adoptive family and puts him on the same footing as a son born in the latter family - it is a formal affiliation of a son through the efficacy of religious ritual and the Hindu law recognises practically no distinction between the rights of such a son and those of a natural son to the family property. In the General Clauses Act (X of 1897) the words 'son' and 'father' have been defined to include relations by adoption and the legislature could not have intended to exclude the adopted son and the expression was used (according to their Lordships) in S. 59 of the Punjab Tenancy Act 1887, for brevity instead of using son, son's son etc. The Personal law is the Hindu law except in so far as modified by custom and personal law includes laws modified by custom.

In Kanhaya v Naurang[72] it was held that among the Rors of Sutana in the Panipat Tahsil of Karnal District, a valid custom exists whereby a widow can adopt a son to her husband, and that a son can succeed collaterally in his adoptive father's family. Their Lordships observed that there could be no doubt that according to the Riwaj-i-am, a widow can adopt although such adoption must be made under the authority of her husband or with the consent of collaterals. Again according to Riwaj-i-am (at p. 43) it is stated that the adopted son becomes a member of his adoptive father's family and is entitled as such to succeed collaterally in that family. In Gokul Chand v Milkhi[73] also it was held that a person who has been formally adopted by a Brahmin of Mauza Nurpur, Tahsil Garhshankar of District Hoshiarpur, is entitled to succeed collaterally in the adoptive family. Their Lordships observed that in this case the adoption was a formal one and not a mere appointment of an heir, the parties being Brahmins. The right to collateral succession was supported by the judgment of the Commissioner which decided the question of collateral succession in favour of an adopted son.

From a perusal of the above cases it seems to be established that in case of 'formal' customary adoptions in the Old Delhi territories, Karnal and Rohtak and among Jats, as in the case of Dattaka adoptions under the textual Smriti law, the adopted son occupies the same position as a natural-born son for purposes of succession to the collaterals of his adoptive father and vice-versa, but in the case of 'informal'

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72. (1923) 76 I.C. 754.

73. (1916) 35 I.C. 543.

adoptions and appointments under Punjab Customary Law the appointee does not succeed to collateral relations in the appointer's family.

Position under the Hindu Adoption and Maintenance Act 1956.

The adopted child is entitled to succeed to collateral relations of the adopter under the Hindu Adoptions and Maintenance Act, 1956. Under Section 12 of the Act the adopted child is deemed to be the child of his or her adoptive father of mother for all purposes with effect from the date of adoption, from which date all the ties in his natural family are deemed to be severed and replaced by those created by the adoption in the adoptive family. As to adoptions made before the commencement of the Act, S. 30 of the Hindu Adoptions and Maintenance Act provides that nothing contained in the Act shall affect any adoption made before the commencement of the Act, and the validity and effect of any such adoption shall be determined as if this Act had not been passed.

The position under English law

Section 16 of the Adoption Act 1958 (which corresponds to S. 13 of the 1950 Act) deals with English intestacies, wills and settlements. The provisions contained in Sections 16(i) and (ii) have been discussed at pages 95 to 97 and 140 to 141 which may be referred to.

Section 17 of the Adoption Act, 1958 contains provisions supplementary to S. 16 and enacts that for the purposes of the application of the Administration of Estates Act, 1925, to devolutions as in para. 1 above, and in the construction of any disposition falling within para. 2, an adopted person shall be deemed to be related to any other person being the child or adopted child of the adopter or either of two joint adopters -

(a) where he or she was adopted jointly by two spouses and the other person is the child or adopted child of both of them, as brother or sister of the whole blood,

(b) in any other case, as brother or sister of the half blood.

And for the purposes of subsection (2) of S. 16, a disposition made by will or codicil shall be treated as made on the date of the death of the testator.[74] The law of inheritance, as could be seen from a perusal of the above sections, also covers other relationships created by adoption. For instance, the will of a grandfather or uncle by adoption, referring simply to "my granchildren" or "my nephew and neices" includes adopted children.

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74. For a discussion of the law as it was before statutory reform please refer to pages 140 ff.

In Re Gilpin, Hutchinson v Gilpin[75] it was held, on the construction of the will that as the testator knew that his daughter could have no natural lawful children and approved of the fact that she had an adopted child, he must have intended to include in his testamentary dispotion the Plaintiff, who was therefore a child within the meaning of Clause 8 of the will and entitled to the benefit.

On the right to take under a will, it was held in Re Fletcher, Barclays Bank Ltd. v Ewing[76] construing the English will on the footing that the testator was domiciled in England:

(i) Adoption of Children Act 1926 (C. 29) S. 5(2) (repealed) did not exclude in the case of a child adopted under the Act, any evidence which would have been admissible in the case of an illegitimate child, inasmuch as Parliament could not have intended to place an adopted child in a worse position than an illegitimate child, and the Act showed no reason for applying to adopted children principles different from those applicable to illegitimate children.

(ii) as, in the circumstances, which were well known to the testator (i.e., his daughter could not have children) it was impossible that any legitimate children could take under the bequest, the case fell directly within the principle stated by Lord Cairns in Hill v Crook[77] and applied by Jenkins J. in

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75. [1953] 2 All E.R. 1218. Also see pages 117ff.

76. [1949] 1 All E.R. 732.

77. (1873), L.R. 6 H.L. 265, 282. 44 Digest p. 808, No. 6614.

Re Wohlgemuth[78] and the residuary gift took effect in favour of the testator's daughter's adopted children.

On the question whether 'child' includes adopted child, in Re Jebb, Ward-Smith v Jebb[79] a testator by his will made in Oct. 1947 gave his residuary estate on trust, after the death of his daughter, "for such of them the child or children of my ... daughter ... as shall be living at the date of my death and shall attain the age of twenty-one years ..." At the date of his will the testator was eighty-six years old and his daughter was forty-seven. She had married in 1934, but the marriage was not consummated and she obtained a decree of nullity in Dec. 1938. Thereafter she lived with the testator and in Sept. 1947, adopted a child, who had been living with her since April 1947. The testator died in 1948 and the daughter diéd in 1959 without having remarried or adopted a second child. By the Adoption of Children Act 1926 (C. 29) S. 5(2) "child" did not include an adopted child unless a contrary intention appeared. On the question whether the daughter's adopted child was entitled to benefit under the will it was held: construing testator's residuary bequest in the light of the surrounding circumstances at the date of his will, the natural conclusion was that testator intended his daughter's adopted child to benefit, and the extreme improbability that she would marry again and have a child sufficed to exclude the primary meaning of "child" as being confined to natural and legitimate children, so, too, there appeared a contrary intention, sufficient for the purposes of Adoption Act 1926

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78. [1948] 2 All E.R. 882; [1949] Ch. 12.

79. [1965] 3 All E.R. 358; [1965] 3 W.L.R. 810.

(C. 29) S. 5(2) to justify the words "child or children"[80] being read as referring to the adopted child and any other children which the daughter might adopt. However, in view of the amendment of the law by the Adoption Acts of 1950 and 1958 (discussed above)[81] whereby the adopted child is given the same rights as a natural child of the adopter for the purposes of succession in the adopter's family, the decision in this case would be otiose.

In Re Marshall, Barclays Bank Ltd. v Marshall[82] a testator M domiciled in England, after giving a life interest to his wife, left part of his estate to C.S.J. with a proviso for the issue of C.S.J. to take in case he predeceased M. M died domiciled in England in 1945 and his widow in 1955. In 1945, before M's death C.S.J. and his wife whilst domiciled in British Columbia adopted A.Y., a child domiciled in that Province. C.S.J. died in 1950. In 1956 for the first time general rights of inheritance were conferred on adopted children by a statute of British Columbia.[83] The trustees of M's will issued summons to ascertain whether A.Y. was entitled to share in the estate.

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80. For the amended law by statute on the subject please refer to pages 89ff.

81. Please refer to pages 89ff.

82. [1957] 3 All E.R. 172.

83. The Adoption Amendment Act 1956 of British Columbia, repealed Section 12 of R.S. 1948, C. 7 and provided, so far as relevant, that for all purposes an adopted child became, on adoption, the child of the adopting parent, as if the child had been born to that parent in lawful wedlock and that the relationships of persons to one another should be determined accordingly.

In the court of first instance, Harman J., differing in this respect from the view of Barnard J. in Re Wilby[84] recognised for the purposes of an English will, adoptions effected in the law of the domicil but decided on an examination of the law of domicile of A.Y. in 1945, the date of M's death that he was not entitled to succeed. On appeal Romer L.J. delivering the judgment of the court agreed with the ground upon which Harman J. had based his decision and observed

> "It seems to us, that only those who are placed by adoption in a position, both as regards property rights and succession, equivalent, or at all events substantially equivalent to that of the natural children of the adopter, can be treated as being within the scope of the testator's intention".[85]

Commenting on this case, Graveson[86] remarks that this decision is a great advance on the previous cases[87] for it represents an escape from the narrow bounds of the English Adoption Act. He observes that, ignoring for the moment the choice of 1945 rather than 1955 as the relevant date for the

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84. See page 144ff.

85. [1957] Ch. 507 at p. 523; [1957] 3 All E.R. 173, at p. p. 179. For the contrary view in the U.S.A. see Anderson v French (1915), 77 N.H. 509; "If by the law of the State of adoption, there is a limitation upon inheritance by adopted children, such limitation does not, by the better rule, apply to inheritance in a state having no such limitation. But a limitation upon inheritance by a state governing the inheritance in the particular case is normally applicable, regardless of the law of the state of adoption". Goodrich, The Conflict of Laws (4th edn.) 290 quoted in Cheshire's Private International law 8th edn. p. 454, note 2).

86. Graveson: The Conflict of Laws 6th edn. 1969, p. 407.

87. See pages 142ff.

ascertainment of A.Y's rights of succession, for what is of far more significance is the determination of this question by the personal law of the adopted child at whatever date is considered relevant. Dicey in his 'The Conflict of Laws'[88] observes that the court might allow the law governing the adoption to determine the question, and allow the adopted child to succeed if that law would have allowed him to do so, but not otherwise. Dicey observes that this view is contrary to principle because the law of the testator's domicile, not that of the beneficiary's domicil, governs the construction of a will.[89] Rights of succession do not become fixed when a child is adopted any more than they do when a child is born or legitimated or when two persons marry. The law governing a marriage no doubt determines whether a woman is entitled to the status of a wife; but the law governing the succession (which may of course be quite different) determines whether and to what extent she can succeed to her husband's property on his death intestate. Why should a different result be reached in the case of adoption? Dicey asks.[90] I agree with this view of Dicey for the simple reason that the construction of a will is governed by the law of the testator's domicile and if the adopted child is entitled to the property according to the law of the testator's domicile he should get it, irrespective of whether he is entitled or not according

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88. 8th edition Ch. 17 Rule 69 at (3).

89. See Rule 102, Dicey's: The Conflict of Laws 8th edn.

90. For further discussion of this topic see pages 141 ff.

to law governing his domicil.

The above cases also show, that as in the case of Hindu law, so also under the present English law, the adopted child is entitled to inherit the property of collateral relations in the same manner as a natural child of the adopter would be entitled to.

CHAPTER VI

DIVESTING BY THE ADOPTEE

Texts on the subject

There are no texts on the divesting of an estate by adoption. The Mitākshara[1] has only eight lines. The Mayūkha[2] also is silent. It has a single sentence about a woman's right to adopt.[3] "Therefore the right of adoption, even without the order of her husband, does pertain to a widow". The Dattaka Mīmāmsā[4] does not allow widows to adopt, and there can therefore be no discussion on the question of divesting of an estate by adoption. The Dattaka Chandrikā allows widows to adopt but does not go beyond the Mayūkha. It presumes assent if there is no prohibition by the husband[5] and says that a woman with the sanction of her husband is competent to adopt.[6]

Divesting of the widow's estate

Prior to the Hindu Women's Rights to Property Act 1937, the result of an adoption by a widow was that her limited estate as widow at once ceased and the adopted son

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1. Stokes I, XI, 9-14, pp. 415-418.
2. C. IV, S. 5, pp. 58-72.
3. S. 5 Pl 16-18, pp. 63-64.
4. Stokes, p. 534, S. 1, Pl 15-16; p. 537, Pl 27-28.
5. Stokes p. 636, S. 1, Pl 31-32.
6. Stokes p. 630, S. 1, Pl 7; Balu Sakharam v Lahoo Sambhaji (1937) 39 Bom. L.R. 382, 393; I.L.R. [1937] Bom. 508 F.B.

became full heir to the deceased husband's property, the widow's rights being reduced to a claim for maintenance. If the adopted son was a minor, it was held[7] that in such circumstances, she presented the suit (for possession of her husband's share in the joint undivided estate) as guardian of the adopted son, and was put into possession as his trustee and accountable to him for the profits of the property so decreed to her. After the Hindu Women's Rights to Property Act 1937, where the widow took along with the male issue of her husband, an adoption divested only a moiety of the estate held by her, the other moiety being retained by her subject to the limited estate.[8] Where there were several widows, holding jointly, one who had authority from her husband to adopt, where such authority was necessary, would, by exercising it, divest, subject to modifications introduced by the Hindu Women's Rights to Property Act 1937, both her own estate and that of her co-widows and no widow could, by refusing her consent, prevent the adoption or destroy its effect upon her estate.

Adoption by Senior widow divests estate of Junior widow

In Narayanasami v Mangammal,[9] a case from Madras,

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7. Dhurm Das Pandey v Mussumat Shama Soondri (P.C.) (1843) 3 M.I.A. 229.

8. For the Incidents of this estate see J.D.M. Derrett's: Introduction to Modern Hindu law (1963) pages 424-442.

9. (1905) I.L.R. 28 Mad. 315; Cases referred to and followed: Rakhmabai v Radhabai 5 Bom. H.C.R. (A.C.J.) 181 at p. 192; (1868); Bhimawa v Sangawa (1896) I.L.R. 22 Bom. 206; Amava v Mahadgauda (1896) I.L.R. 22 Bom. 416; Subrahmanyam v Venkamma (1903) I.L.R. 26 Mad. 627 distinguished.

it was held that an adoption made after the death of the husband by his senior widow, after having obtained the consent of his sapindas but without consulting the junior widow is valid and cannot be impeached on the ground that such adoption has the effect of divesting the estate of the junior widow or her infant daughter. The consent of kinsmen is required on account of the incapacity of women to act rather than to procure the consent of all whose interests will be defeated by the adoption.[10] In Maharashtra, where no authority is required, the elder widow could of her own accord adopt, and thereby destroy, subject to the modification aforesaid, the estate of the younger widow, without obtaining her consent,[9]

Widow can make successive adoptions

A widow's power of adoption extended to making successive adoptions. In Ganesan v Ganapathy Iyer[11] it was held that the second adoption was valid as the authority to adopt was not exhausted by the first adoption and that the direction that the adoption should be made within one year after the husband's death (as contained in the husband's will in this case) was attributable with more reason to his anxiety for the due performance of his annual funeral rites than to any intention to set a time limit for the exercise of the

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10. P.C. in The Collector of Madura v Moottoo Ramalinga Sathupathy 12 M.I.A., 397 at p. 442; Also see K. Varadamma v K. Sankara [1955] An. W.R. (HC) 948; K.A. Gopalaswami v P. Siddammal A.I.R. 1958 Mad. 488; V. Sundara v C. Satyanarayanamurthi A.I.R. 1950 Mad. 74, [1950] Mad. 461; Bodo v Dondo A.I.R. 1952 Or. 307, 311a.

11. (1947) 2 M.L.J. 126; see also Ram Soonder v Survanee Dassee (1874) 22 W.R. 121 approved in Surya Narayana v Venkatar-amana [1906] I.L.R. 29 Mad. 382 (P.C.).

authority by the widow. Also, as decided by the Privy Council in Vellanki v Venkat Rama[12] and by the various other Courts,[13] where on the death of an Aurasa or adopted son the estate which had descended to him from his father vests in his mother and heir and she makes an adoption to her deceased husband, the estate so vested in her will be divested (because she inherited for a limited estate only). In a later case[14] the Madras High Court held that the same would be the case where the first son left self-acquired property. Mayne has rightly criticized this decision on the ground that the adopted son is to succeed to the estate of his adoptive father and he neither acquires nor has any rights over property which was independent of the adoptive father.[15] The decision of the Madras High Court[14] seems to be erroneous, for, in the case of separate property, the mother is a nearer heir than the brother.

Limitation on the widow's power to adopt.

The starting point regarding the limitation upon the power of the widow to adopt was Lord Kingsdown's judgment

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12. (1876) 4 I.A. 1; I.L.R. 1 Mad. 174, 186.

13 Ram Soondar Singh v Surbonee Dassee (1874) 22 W.R. 121; Jatindra v Amrita (1900) 5 C.W.N. 20; Jamnabai v Raychand (1883) I.L.R. 7 Bom. 225; Ravji v Laxmibai (1887) I.L.R. 11 Bom. 381; Amrita v Surnamon (1898) I.L.R. 25 Cal. 662; Lakhmi v Gato (1886) I.L.R. 8 All. 319; Kumud v Ramesha (1919) I.L.R. 46 Cal. 749, 759, 49 I.C. 609.

14. Suryanarayana v Ramdoss (1919) I.L.R. 41 Mad. 604, 43 I.C. 526.

15. Mayne's H.L. 252 (9th edition).

in Bhoobun Moyee v Ramkishore,[16] wherein the Privy Council held that "upon the vesting of the estate in the widow of the son, the power of adoption of the mother was at an end and incapable of execution". This view was followed in Thayammal v Venkatarama[17] and in Tarachurn v Suresh Chander.[18] Even the fact that the widow left by the son subsequently remarried was held not to give the mother a right to adopt.[19] In Ramkrishna v Shamrao[20] Chandavarkar J. referred to the cases put as illustrations and the reasoning adopted by Lord Kingsdown in Bhoobun Moyee's case[16] and summed up the limiting principle in these words

> "where a Hindu dies leaving a widow and a son and that son dies leaving a natural born or adopted son, or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived".

Continuing Chandavarkar J. says

> "It was much pressed upon us that this principle was not in accordance with either the letter or the spirit of Hindu law as expounded in the books or as understood by the Hindus themselves. But it is not open to us to go into that question and we must take the law as it was laid down in Bhoobun Moyee's case by the Privy Council and as it was interpreted and reaffirmed in two of their Lordships later decisions to which we have

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16. (1865) 10 M.I.A. 279.

17. (1887) 14 I.A. 67, 10 Mad. 205.

18. (1889) 16 I.A. 166, 17 Cal. 122.

19. Ramchandra v Murlidhar (1937) 39 Bom. L.R. 509.

20. (1902) I.L.R. 26 Bom. 526, 532 (F.B.). Followed in Manickyamāla v Nandakumara (1906) 33 Cal. 1306 by the Calcutta High Court. Approved by the Judicial Committee in Raghunada Deo v Brozokishore (1876) I.L.R. 1 Mad. 69. L.R. 3. I.A. 154. See also article by Elhence, V.P.: Widow's Power of Adoption: A.I.R. 1956 (J) 57 for a review of some of the cases on the subject.

already referred".[21]

Another argument urged in favour of the adoption was that in this case the grandmother took an absolute estate in her grandson's property and that she could adopt on becoming possessed of such estate, but their Lordships felt it unnecessary for them to express any opinion on that point in this case in view of the law laid down by the Privy Council in Bhoobun Moyee's case.[16] The argument that all that the Privy Council meant to decide was that a widow could not adopt so as to divest an estate vested in another person was also addressed to their Lordships both in Padma Coomari's case[21] by the respondent's Counsel and in Thayammel's case[21] by Appellant's counsel and their Lordships pronouncement was that the decision in Bhoobun Moyee's case[16] went much farther than merely holding that a widow could not adopt so as to divest an estate vested in another person, that is, what the case decided was that the vesting of the estate in the widow of the son, Bhowani "was a proper limit to the exercise of the power", and the moment that limit was reached the power was at an end. This principle was approved and applied by the Privy Council in Madana Mohan v Purushottama and reluctantly.[22] This case is the story of

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21. P.C. decision in Bhoobun Moyee's case (see note 16) was reaffirmed in their later decisions in Padma Coomari's case L.R. 8 I.A. 229; 8 Cal. 302 and in Thayammal's case (see note 17).

22. (1918) 45 I.A., 156; ( ). This question has been hotly discussed by Derrett in his article "Adoption by a daughter-in-law and divesting" (1964) 1 M.L.J., J., 3 and by S. Vaidyanathan at A.I.R. 1967 Journal 135. These are discussed in subsequent pages at p. 287 et seq. and also by the S.C. in Gurunath v Kamalabai (1955) 1 M.L.J. (S.C.) 91: (1955) S.C.J. 178 - also discussed at pages 242, 285, 289 et seq.

Raghunada v Brozo Kishore[23] continued. In this case A, the holder of an impartible Zamindari and a member of a joint family governed by Mitakshara law, gave authority to his wife to adopt a son to him. On A's death his brother R took possession of the property. The widow subsequently adopted a son B, who recovered the estate from R, and held it until 1906 when he died leaving a widow but no son. A descendant of R then took possession of the property but died in the same year and was succeeded by his son, the Respondent. In 1907 A's widow purported to make a second adoption to A under the authority from him by taking in adoption the Appellant. In a suit brought by him to recover the Zamindari, it was held, that the law imposed a limit within which a widow could exercise a power of adoption conferred on her and the limit to her power was reached when B died after attaining full legal capacity to continue the line of descent either by a natural born son, or by adoption to him of a son by his own widow, against whom it had been established (she not being a party to the suit) that she had no power to adopt. The conclusion was in no way in conflict with the previous decision of the Board in Raghunada Deo v Brozo Kishore.[20] It was necessary to decide whether the authority to adopt empowered A's widow to make the second adoption.

On adoption of Brozo Kishore, as decided by the P.C. in 1876 he became entitled to oust Raghunadha whose right to enter was only temporary, operating merely to prevent the ownership from being in abeyance pending any such succession to his elder brother as the adoption brought about. But when

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23. (1875) 3 I.A. 154, 1 Mad. 69.

Brozo Kishore succeeded he became himself the full owner, from whom heirship must be traced instead of as earlier from A. The widow of the latter was therefore in a different position when she endeavoured to effect the second adoption from that which she occupied on the former occasion. She could on that occasion, by exercising the power conferred on her, establish a direct succession to the estate of her husband Adikondai, which related back to his death and any authority she could originally be taken to have received to make a second adoption had become inoperative by reason of the changed circumstances. The limiting principle enumciated by Chandavarkar J.[24] in Ramkrishna v Shamrao[20] was approved and applied by the Judicial Committee.

In Pratapsing v Agarsingji[25] the suit was brought by the Thakor of Ganph, for the possession of a village, which, in accordance with a family custom of Girasia Rajputs had been granted for Jivai or maintenance by one of his ancestors to a junior member of the family to be held and enjoyed so long as the grantee's male line lasted and then reverted to the Thakoor. The last owner died without male issue in 1903 but he left a widow, who, though by custom she was not permitted to inherit her husband's estate, continued in possession of it and in March 1904 adopted the first appellant in this case as a son to her husband. It was held by their Lordships of the Judicial Committee, reversing the decision of the High Court, that the Jivai grant did not revert to the Thakoor but was inherited by the adopted son.

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24. See ante p. 236.

25. [1919] I.L.R. 43 Bom. 878.

The Judgment was delivered by Ameer Ali J. who observed that it was an explicit principle of Hindu law that the adopted son becomes, for all purposes, the son of his father and that his rights, unless curtailed by express texts, are in every respect the same as those of a natural born son. He referred (at p. 792) to West and Bühler who pointed out in their treatise on Hindu law that the Hindu lawyers did not regard the male line to be extinct or a Hindu to have died without male issue until the death of the widow renders the continuation of the line by adoption impossible.[26] Much reliance was placed by counsel for the Respondent on the case of Bamundoss v Mst. Tarinee.[27] The only point decided in that case was that a mere power given to a widow to adopt does not preclude her from maintaining an action in her own name and in her own right in respect of the property in her possession as her husband's widow. It was also pointed out that there was no power under the Hindu law to compel a widow to adopt. Unless there is a time limit imposed in the authority which empowers a Hindu widow to adopt, or she is directed to adopt promptly, she may make the adoption so long as the power is not extinguished or exhausted. Her right to make an adoption is not dependent on her inheriting, as a Hindu female owner, her husband's estate. She can exercise the power so long as it is not exhausted or extinguished, even though the property was not vested in her. The circumstances under which her power became extinguished was clearly pointed out by their Lordships of the Privy Council in Bhoobun Moyee's[16] and Madana Mohan's

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26. West and Bühler, Hindu Law, p. 996.

27. (1858) 7 Moo. I.A. 169. This principle is used in I.T. cases to determine whether there is a H.U.F.

cases.[22] In Ramchandra v Murlidhar[28] the Bombay High Court held that even the fact that the widow left by the son remarried did not give the mother a right to adopt. But this view has been dissented from in Govinda v Shenfad[29] wherein it was held that under the Hindu law adoption is a spiritual matter and should be dissociated from the view that it was mainly concerned with temporal matters such as the devolution of an estate. The power of a widow to adopt does not depend upon the question of vesting or divesting of the estate.[30] Their Lordships of the Nagpur High Court observed that this principle had been laid down by the Privy Council in Amarendra Man Singh v Sanatan Singh[30] and was emphasised by their Lordships of the Privy Council in Vijaysingji v Shivsangji[30]

> "It was on this ground that the adoption in that case (Amarendra's case)[30] which was made by a widow after the death of her natural son without leaving a son or a widow, was found to be valid, though the estate had vested in a collateral of the son. In the present case the natural son with his wife having ceased to exist for the purpose of continuing the line in the Ahima family, his mother was entitled to make an adoption to secure that object. The adoption of Mansangji undoubtedly served the purpose in question, and it cannot be impeached simply because it would defeat the estate which had vested in some other person".

As was stated in Bapuji v Gangaram[31] in summarising the principle established in Amarendra's case[30] "The religious need is a son. It is a need divorced from property. Paupers have

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28. (1937) 39 Bom. L.R. 509.

29. [1949] I.L.R. Nag. 416; Also in Bapuji Ramji v Gangaram [1941] I.L.R. Nag. 178.

30. Amarendra Mansingh v Sanatan Singh (1933) I.L.R. 12 Pat. 642 (P.C.) and Vijaysingji v Shivsangji A.I.R. [1935] P.C. 95 followed.

31. [1941] I.L.R. Nag. 178, 181.

souls and souls need prayers". This is highly questionable in view of the Supreme Court ruling on the powers of a widow who has a daughter-in-law in Gurunath v Kamalabai,[32] wherein it was laid down that the mother's power to adopt was lost when the son died leaving his son and widow and was not revived by the subsequent deaths of the son, the son's widow and the son's son, as had happened in that case. As observed by Derrett[32] this would lead to sad effects both in human and economic terms and it would be up to Parliament to remedy the matter - which it shortly afterwards sought to do for all adoptions after enactment of the Hindu Adoptions and Maintenance Act 1956. The real meaning and point of Bhoobun Moyee's and Gurunath's cases[32] needs to be examined carefully. Were the Privy Council and the Supreme Court in error? I am unable to agree with these decisions as I fail to understand why any such limitation on the widow's power of adoption should be placed at all. The Smritis are silent on the point. Further the adoption definitely leads to temporal benefit in continuing the name of the family etc., and possibly also to spiritual benefit. Logically speaking, it would appear that there should be no limitation to the widow's power to adopt as long as she lives (except, perhaps, when a daughter-in-law adopts first and when her adopted son is still alive to continue the family name). The power would automatically cease on the death of the widow.[32a]

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32. Gurunath v Kamalabai [1955] 1 M.L.J. (S.C.) 91: [1955] S.C.J. 178. Also see articles entitled "Adoption by a Daughter-in-law and divesting" by Derrett [1964] 1 M.L.J.J. 3 and S. Vaidyanathan: A.I.R. 1967 (J) 135 which are discussed subsequently on pages 287 et seq.

32a. A similar view is expressed by Dabke, G.K. in his article: Termination of widow's power to adopt. (1953) 55 Bom. L.R. J, 57.

Capacity of a widow to adopt in Bombay

Where an Aurasa or adopted son died unmarried leaving his mother as heir, her dormant power of adoption had long been held still exercisable.[33] In Bombay, in the earlier cases, it was held that the widow could not adopt without consent of her husband's undivided coparceners where the husband died joint.[34] She could, however, adopt if she had the authority of her deceased husband.[35] In Mallappa v Hanmappa[36] it was held that the adoption of the Plaintiff was valid as the widow's power to adopt remained suspended even after partition between her minor son (deceased) and his uncles and could be exercised as there were no longer any coparceners whose consent was necessary (i.e. after the decease of her minor son who died after partition). Their Lordships observed that a widow succeeding as heir to her son who dies unmarried is entitled to adopt to her husband provided that her son has not attained ceremonial competence and referred to the decision in Verabhai v Bai Hiraba[37]. The principle of such recognition is that the act of adoption is derogatory of no other vested right than those of the adopting mother.[38] That and the condition that the son's

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33. Mallappa v Hanmappa (1920) I.L.R. 44 Bom. 297; Vellanki v Venkatarama (1876) 4 I.A. 1; Verabhai v Bhai Hiraba (1903) 30 I.A. 234.

34. Ramji v Ghamau (1882) I.L.R. 6 Bom. 498 followed in Dinkar v Ganesh (1882) I.L.R. 6 Bom. 505.

35. Bachoo v Khushal Das (1902) 4 Bom. L.R. 883.

36. (1920) I.L.R. 44 Bom. 297.

37. (1903) I.L.R. 27 Bom. 492.

38. Vellanki v Venkat Rama (1876) L.R., 4 I.A. 1; Gavdappa v Girimallappa (1894) 19 Bom. 331 and Payapa v Appama (1898) 23 Bom. 327.

estate has not vested first in some other than herself were the only two conditions, which, in their Lordships opinion, stood in the way of a widow's right to adopt even if the husband died in union.

The law in Bombay requiring consent where the husband died joint, was altered by the Privy Council in Yadav v Namdeo[39] wherein it was laid down that in the Maratha country of Bombay Presidency and in Gujarat a Hindu widow, whose husband has not expressly forbidden her to adopt a son to him has power to do so without the consent of her husband's kinsmen, whether or not her husband's estate is vested in her, and whether or not he died separated. In this case a Hindu settled in the Central Provinces and was governed by the law applicable in Maratha country of Bombay Presidency. Shortly before his death in 1905 he stated that he did not wish to adopt a son, but that if an adoption was made, the son of his brother should be adopted. Upon his death the widow adopted the named boy who died in 1907. In 1908 the widow of the adoptive father adopted to him the Appellant. It was held by the Privy Council that there was no direction to the widow forbidding her to make an adoption if the boy named was not available or died, and that in accordance with the rule above stated she had power to adopt the Appellant. A full bench of the Bombay High Court, in a subsequent case,[40] held that the

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39. (1922) 49 I.L.R. Cal. 1.

40. Ishwar Dadu v Gajabai (1926) I.L.R. 50 Bom. 468 (F.B.) follo. in Ganesh v Gour Nath A.I.R. (1926) Bom. 575; Bhimabai v Gurunath (1928) A.I.R. Bom. 367, 30 Bom. L.R. 859; Babanna v Parawa (1926) I.L.R. 50 Bom. 815, 828; Bala Anna v Akubai (1926) I.L.R. 50 Bom. 722; Also followed in Tani v Krishanappa A.I.R. (1929) Nag. 289, Baswant Rao v Deo Rao A.I.R. 1927 Nag. 2.

decision in Ramji v. Ghamau[34] was not overruled by the Privy Council[39] (Crump J. dissenting). The view of Shah J. that in a joint family, where the property vests in the coparceners on the death of one of them, the religious rites will be carried on by them and therefore there is no necessity of adoption is not sound. The full bench decision is undoubtedly opposed to the views expressed by the Privy Council in Yadao v. Namdeo[39] and the view taken by Crump J. seems correct. For their Lordships of the Privy Council had rightly observed in Yadao's case[39] that there does not seem to be any reason why a widow's power to adopt should be different according as her husband died separated or unseparated or she had or had not the estate vested in her.[39] It would appear that Shah J. was not unreasonably, swayed by the risks to which joint families would be exposed if widows were allowed unrestricted powers to adopt. I am inclined to agree with the Privy Council view in Yadao's case for reasons which I have stated above.

Following the decision in Yadao v. Namdeo[39] and reversing the decision of the Bombay High Court in Bhimabai v. Gurunathgouda[40], the Privy Council has also held in Bhimabai v. Gurunathgouda[40a] that according to the law prevalent in the

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40a. [1932] L.R. 60 I.A. 25. This decision has been criticised in various articles - see Bhimabai v. Gurunathgouda and and After by S.R. Kulkarni: [1933] 35 Bom. L.R. (J) 39; Bhimabai v. Gurunathgouda and After: by S.V. Anegundi [1933] 35 Bom. L.R. (J) 60, Bhimabai v. Gurunathgouda by "Inner Temple" [1934] 36 Bom. L.R. (J) 1; Bhimabai v. Gurunathgouda and Amarendra Man Singh v. Sanatan Singh , by P.V. Kane [1934] 36 Bom. L.R. (J) 12.

Maratha Country of the Bombay Presidency, a Hindu widow, unless she was expressly forbidden by her husband to adopt a son to him, can do so although he died undivided and she has not obtained the consent of his surviving coparceners. The cases of Ramji v. Ghaman[34] and Ishwar Dadu v. Gajabai[40] were overruled.

No divesting of Property vesting by inheritance in heir of last surviving coparcener.

At this stage there was one question on which there was for long no definite pronouncement by the Privy Council. Where the property vested by inheritance in the heir of the last surviving coparcener, it was originally held in earlier cases that a widow of a pre-deceased coparcener could not make a valid adoption which would have the effect of divesting property already vested by inheritance.

In Chandra v Gojarabai,[41] one Krishnaji and his two sons Bhau and Nana were members of an undivided family. Bhau died first and then Krishnaji died. At the time of his death, Nana was full owner as last survivor of the joint family. The property then devolved as his and a subsequent adoption, however well authorised, to Bhau a collateral heir of Nana was held not entitled to oust the defendant Gojarabai from the estate of her husband, who did not claim through Bhau at all. It was observed by their Lordships that if the question had arisen between the Plaintiff and Nana, the Plaintiff would have been entitled to succeed as laid down in Raghunada v Brozo Kishore.[20] Adoption by a widow under her husband's authority had the effect of divesting an estate vested in any member of the undivided family of which the husband was himself a member. But it did not divest the estate of one on whom the inheritance had devolved from a lineal heir of the husband. Their Lordships[16] further observed that this rule, deduced from Bhoobun Moyee's and other cases of the Privy Council, must, however, be supplemented by the addition that an adoption, though authorised by the husband, cannot divest an estate vested in a collateral relation of the husband in succession to some other person who had himself become owner in the meantime. A conclusion opposite to that expressed here, would, according to their Lordships, certainly

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41. (1890) I.L.R. 14 Bom. 463 (2nd Appeal to H.C.), followed in Shri Dharnidhar v Chinto (1895) 20 Bom. 250, Vasudeo Vishnu v Ramchandra (1898) 22 Bom. 551 (F.B.); Shivbasappa v Nilava (1923) 47 Bom. 110; Shivappa v Rudrava (1933) 57 Bom. 1; Adivi Surya Prakash Rao v Nilomarty Gangaraja (1910) 33 Mad. 228.

lead to much inconvenience and embarrassment. The adoption after Nana's death would have the effect of depriving Gojarabai of the whole estate and reducing her claim to one for maintenance only. Their Lordships further observed that they could find no authority either of the text books or of decided cases going to the full extent necessary for sanctioning the claim of the Plaintiff. Thus in this and in other cases wherein this view was followed,[41] a mistaken distinction was made between cases of vesting by inheritance and vesting by survivorship. While in the latter case adoption could validly be made till the coparcenary came to an end, in the former case an adoption could not be made, once the inheritance vested in a collateral. This view was rightly doubted by Seshagiri Aiyar J., in Madanmohan v Purushottam[42] and by Venkata Subba Rao J. in Panyam v Ramlakshmamma.[43]

Adoptive son can claim father's share when coparcenary becomes extinct by Partition

In Panyam v Ramlakshmamma,[43] where the coparcenary had come to an end by partition and there was vesting in another, it was held that the true test of the principle defining the limit of the widow's power of adoption is to be sought, not in the rule of divesting or otherwise of an estate but in the rule that requires the continued presence of a person to perform all the requisite religious services and

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42. [1915] I.L.R. 38 Mad. 1105, 1118.

43. [1932] I.L.R. 55 Mad. 581, 590. This dissent was noticed by their Lordships of the Privy Council in the case of Anant v Shankar (1943) 70 I.A. 232. I:L.R. (1944) Bom. 116 which is discussed in subsequent pages.

the limit is reached on the happening of the event mentioned by Chandavarkar, J. in Ramkrishna v Shamrao.[44] Appellant's counsel referred to cases such as Chandra v Gojarabai,[41] Suryaprakasa Rao v Nidamarty Gangaraju,[45] Shri Dhamnidhar v Chinto.[46] In these cases the reason for holding the adoption invalid was that when the estate vested in the heir the power of the widow came to an end. Whether these decisions, though in conflict with principles affirmed by the Judicial Committee, so far as they go, be followed or not on the ground of stare decisis was a point on which their Lordships expressed no opinion.. They observed, however, that there was no warrant for extending the rule beyond the facts of those cases. Those facts were that the coparcenary had become extinct by death of the last surviving coparcener and his property thereupon devolved on his heir. The facts in the present case were different in the sense that the coparcenary became extinct not in that manner but by the survivors having come to a partition of the joint family property and their Lordships were not prepared to hold that in such case the widow's power comes to an end. There were no reported decisions on the actual point raised in the appeal. But the opinion of Sarkar Sastri supports the Plaintiff's contention. Says Sarkar Sastri

> "To re-open the partition for giving a share to the adopted son, would lead to great difficulties, for one of the co-sharers might alienate his share to a purchaser for valuable consideration without notice".

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44. (1902) 26 Bom. 526, 532 (F.B.). See ante page 236.

45. (1909) I.L.R. 33 Mad. 228.

46. (1895) I.L.R. 20 Bom. 250.

But he goes on to observe that the point was not free from difficulties and refers to some conflict which he supposes to exist between the two Privy Council cases viz. Bhoobun Moyee's case[16] and the first Chinnakimedi case.[47] In Krishna v Sami[48] a full bench of five judges deduced from the Hindu law a principle which was the exact opposite of that stated by Sarkar Sastri. The relevant observation is contained in the following passage

> "Again, let C have died before partition, leaving a widow and having given her power to adopt which she does not exercise till after a partition has been made by B, D and E. When she exercises her power we apprehend that the adopted son would be entitled to call upon his uncles to make over to him a portion of the wealth equal to that which would have been taken by his father - Sri Virada Pratapa Raghunada Deo v Sri Brozo Kishore Patta Deo".[49]

Examining the matter on principle, Venkatao Subba Rao J. in Panyam v Ramalakshmamma[43] observed (a) the test of the limiting principle was what they had stated above, it stood to reason that, when once the spiritual purposes were satisfied, the power to adopt finally and for ever comes to an end; (b) the validity of adoption must be judged intrinsically on its own merits and not with respect to considerations extraneous to it. The suit relates to the estate not of the adoptive widow's husband but of her father's and the Plaintiffs were not interested in the rights which were said to be defeated nor were the husband's agnates interested in the estate which Plaintiffs represent. The adoption had been made with the

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47. [1876] I.L.R. 1 Mad. 69 (P.C.). (Raghunada v Brozo Kishore)

48. [1885] I.L.R. 9 Mad. 64 (F.B.).

49. [1876] I.L.R. 1 Mad. 69 (P.C.).

consent of these agnates and thus no question of safeguarding their rights can arise.

Distinction between cases of vesting by inheritance and vesting by survivorship swept away.

The decision of the Privy Council in the leading case of Amarendra v. Sanatan Singh[50] following the implications of the decision in Pratapsing's case[25] swept away the distinction between cases of vesting by inheritance and vesting by survivorship and approved the rule laid down in Ramakrishna v. Shamrao.[20] In this case a Hindu governed by the Benaras

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50. [1933] I.L.R. 12 Pat. 642 reversing 10 Pat. 1 and overruling Bhimabai v. Tayappa (1912) 37 Bom. 598. As a result of the P.C. decision Annamali v. Mabbu Bali Reddy (1874) 8 Mad H.C. 108; Adivi v. Nidamorty [1910] 33 Mad. 228 and Chandra v. Gojonabai [1890] 14 Bom. 463 and cases following them were no longer good law. The decision in Amarendra's case has been criticized by S.R. Kulkarni in his article: Amarendra Man Singh v. Sanatan Singh [1934] 36 Bom L.R. (J) 25 and by P.V.Kane in his article Bhimabai v. Gurunathgouda and Amarendra Man Singh v. Sanatan Singh [1934] 36 Bom. L.R. (J) 12 Also see article by Rita B. Hansa ; Adoption and Religious Control; (1968) 54 A.B.A. J 77.

The Bombay Full Bench decision in Krishnaji v. Rajaram [1938] I.L.R. Bom. 679 not only holds that the estate inherited by a widow as a widow of a gotraja Sapenda is not divested by adoption, but that the adopted son could not inherit the property in preference to the contesting reversioners in spite of the fact that he was nearer to the last holder when the succession opened. This decision seems to be erroneous and against the views of the P.C. in Pratapsingh's[25] and Amarendra's[50] cases. See also article by G.K. Dabke: Divesting of Estate on Adoption (1939) 41 Bom. L.R., J., 41.

School of Mitakshara was survived by an infant S and by a widow to whom he had given authority to adopt in the event of the son dying. The son S Succeeded to the impartible Zamindari held by his father but died unmarried at the age of 20 years, 6 months. Thereupon the widow, the son S's mother made an adoption to his father. By a custom of the family, females were excluded from inheriting. In a suit claiming inheritance against the adopted son it was held that as the natural son had left no son to continue the line nor a widow to provide for its continuance by and adoption, the adoption by his mother was valid, although the Zamindari was not vested in her and although the son had attained the age above stated. Their Lordships reviewed the authorities as to limits to the exercise of a power to adopt. Their Lordships

observed that the Ninth Chapter of Manu's code, which has always been regarded as of paramount authority is instinct with the doctrine of spiritual benefit of sonship. The father by birth of a son discharges his debt to his progenitors (V. 106), through him he attains immortality (V. 107); by a son a man obtains victory over all people; by a son's son he enjoys immortality: and afterwards by the son of that grandson he reaches the solar abode (V. 137); a son is called 'Putra' because he delivers his father from 'Put' (V. 138). In the Dharmasūtra of Baudhāyana the formula prescribed for adoption is "I take thee for the fulfilment of my religious duties. I take thee to continue the line of my ancestors".[51] In their Lordships' opinion it was clear that the formulation of the Brahmanical doctrine of adoption was the duty which every Hindu owed to his ancestors to provide for the continuation of the line and the solemnization of the necessary rites and it may well be that if this duty has been passed on to a new generation capable itself of the continuance, the father's duty has been performed and the means provided by him for its fulfilment spent, the debt he owed is discharged and it is upon the new generation that the duty is now cast and the burden of the "debt" is now laid. In this connection it may be pointed out that if the new generation fails in this duty irredeemably and if the widow of the owner is still alive to revive the line by means of an adoption, there seems to be no reason why she should be prohibited from doing so and more so as this would be beneficial from the point of view of spiritual

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51. Baudh. VII, 11, Sacred Books of the East (1882) Vol. XIV, 335.

benefit also. Continuing, their Lordships observed that it could hardly be doubted that in this doctrine, the devolution of property, though recognised as an inherent right of the son was altogether a secondary consideration as observed by Sir James Colville in Raghunada's case.[20] Having regard to this well-established doctrine of the religious efficacy of sonship, their Lordships felt that great caution should be observed in shutting the door upon any authorised adoption by the widow. The authoritative texts do not appear to limit the exercise of the power by any considerations of property. But, as their Lordships put it, that there must be some limit to its exercise or at all events some conditions in which it would be either contrary to the spirit of the Hindu doctrine to admit its continuance or inequitable in the face of other rights to allow it to take effect, has long been recognised both by the Courts in India and by the Privy Council and it was upon the difficult question of where the line should be drawn and upon what principle, that the argument in the present case had mainly turned. Their Lordships then referred to Bhoobun Moyee's case.[16] After the death of Bhoobun Moyee, Ram Kishore got possession of the property and if his adoption was good he was undoubtedly the next heir. His title however was disputed by a distant collateral and the validity of his adoption was the subject of another suit. The Bengal High Court upheld the title of Ram Kishore but on appeal to the Privy Council in Pudmakuman Debi v Court of Wards,[52] the High Court decision was reversed, the opinion of their Lordships being that upon the vesting of the estate in the widow of

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52. [1882] I.L.R. 8 Cal. 302.

Bhowanee the power of adoption was at an end and incapable of execution and that this was what the Board had held in the previous case.

The question was again considered in Thayammal's case.[53]

It was clear from the Board's decisions in Raghunada v Brozo Kishore,[20] Bachoo v Mankorebai[54] and Yadao v Namdeo[55] that vesting of joint family property in another coparcener does not put an end to the widow's power of adoption. Their Lordships recited the judgment of Chandavarkar J. approved in Madana Mohana's case[22] and also referred to Pratapsing's case.[25] Their Lordships agreed completely with a citation from Wallace J. in Tripuramba v Venkataratnam[56]

> "The purpose of adoption, is to perpetuate the line, and if the only son dies without leaving anyone to perpetuate the line, there seems no good reason for restricting the power of his mother to perpetuate it in the only way she can by adopting a son to her own husband".

Their Lordships felt that there was no foundation for the contention that a widow's authority to adopt is extinguished if her son has attained ceremonial competence. Their Lordships relied upon the principle stated in Raghunada v Brozo Kishore

> "That the validity of an adoption is to be determined by spiritual rather than temporal considerations that the substitution of a son of the deceased for spiritual reasons is the essence of the thing and the consequent devolution of property a mere accessory to it".[20]

After a full review of the authorities their Lordships came

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53. Thayammal v Venkatarama [1887] 14 I.A. 67, 10 Mad. 205.

54. (1907) 34 I.A., 107, 31 Bom. 373.

55. [1921] 48 I.A. 513, 49 Cal. 1.

56. (1922) I.L.R. 46 Madras 423.

to the conclusion that

> "the vesting of the property on the death of the last holder in some other than the adopting widow, be it either another coparcener of the joint family, or an outsider claiming by reverter, or their Lordships would add, by inheritance, cannot be in itself the test of the continuance or extinction of the power of adoption".

Their Lordships held accordingly(i) that the interposition of a grand-son or the son's widow, brings the mother's power of adoption to an end. (2) that the power to adopt does not depend upon any question of vesting or divesting of property and (3) that a mother's authority to adopt was not extinguished by the mere fact that her son had attained ceremonial competence.

The decision in Amarendra's case[50] was followed in Vijaysingji v Shivsangji,[57] in Anant v Shamkar[58] and in Neelangouda v Ujjangouda,[59] all of which came up from Bombay. In Vijaysingji v Shivsangji[57], the holder of an impartible estate in the Bombay Presidency died in 1899 survived by a widow and a son. The son inherited the estate but in 1915 was adopted into another family. In 1917 the widow made an adoption to her deceased husband. The High Court held that the adoption was invalid on the ground that upon the adoption in 1915 the estate had become vested in the heir. The Privy Council reversed the decision and held that the widow had power to make the adoption, for the purpose of continuing the line of her deceased husband, although the estate was not vested in her.

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57. (1935) I.L.R. 59 Bom. 360 (P.C.); (1935) 62 I.A., 161 reversing (1932) 56 Bom. 619.

58. [1944] I.L.R. Bom. 116 (P.C.).

59. (1949) 1 M.L.J. 94 (P.C.).

Amarandra v Sanatan Singh was followed and their Lordships observed that a widow's power to adopt does not depend upon any question of vesting or divesting of the estate. It became unnecessary to decide whether the son, upon being adopted out of the family in 1915, retained the estate to which he had inherited from his natural father.

No divesting of property from heir of last surviving coparcener though adoption was held to be valid - an erroneous view.

In Balu Sakharam v Lahoo Sambhaji,[60] (which was among the main cases discussed by their Lordships in the leading case of Anant v Shankar),[58] one S who was the last surviving coparcener in a joint Hindu family died in 1919 leaving him surviving his widow and his sister. In 1923 a widow of a predeceased coparcener in the family adopted a son (Defendant No. 1). In 1926 the widow S remarried and his sister claimed to have inherited the property in suit. In 1929 the sister sold the property to the Plaintiff. In 1930 the adopted son having taken forcible possession of the property, the Plaintiff filed a suit to recover possession. A question having arisen as to whether the adoption was valid, and if so, whether it had the effect of divesting the property in the hands of the sister the opinion of the majority of the Full Bench of the Bombay High Court, Beaumont C.J. and Wadia J. was that under the Hindu Law, a widow's right to adopt is based on religious considerations and is not affected by any consideration as to the vesting and divesting of the property, therefore an adoption made by a widow of a predeceased coparcener after

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60. (1937) 39 Bom. L.R. 382.

the termination of the coparcenary by the death of the surviving coparcener is a valid adoption, but it would not have the effect of reviving the coparcenary and would not divest the property from the heir of the last surviving coparcener (other than the widow) or those claiming through him or her.

Balu Sakharam's case over-ruled

The decision in Anant v Shankar[58] and Neelangouda v Ujjangouda[59] over-ruling the full bench decision of the Bombay High Court, held that as the adoption was valid, it must have effect.[61]

In Anant v Shankar,[58] the appellant Anant brought the suit in 1932 to recover certain Watan[62] properties from respondent Shankar to whom possession had been given in 1928 by the order of a Revenue Court. The family was governed by the Mitakshara school of Hindu law. The pedigree was as follows:

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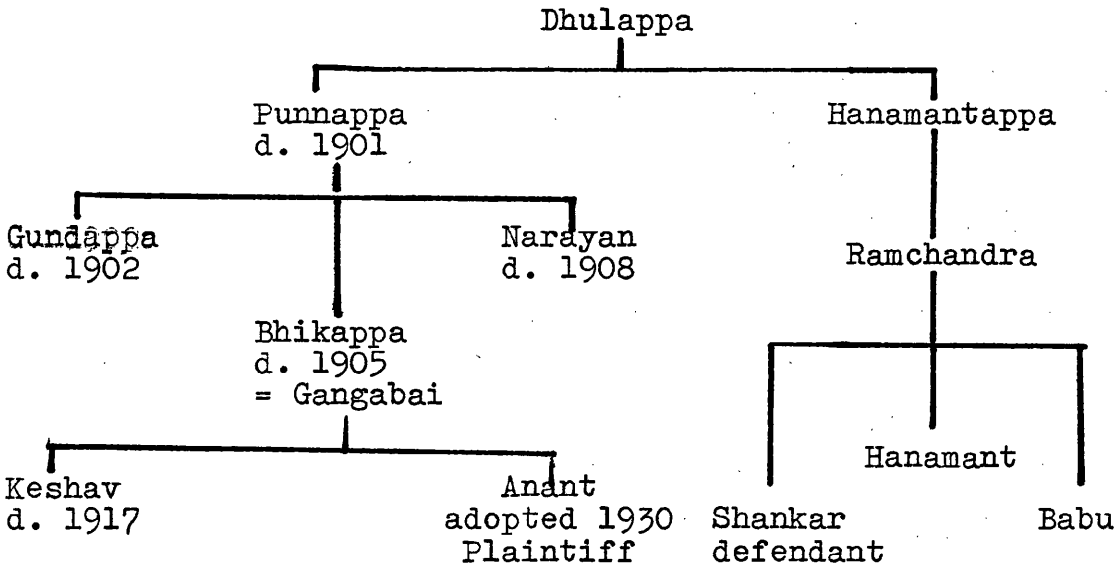
61. [1943] 70 I.A. 232; I.L.R. [1944] Bom. 116; [1949] 1 M.L.J. 94, 96 P.C.; Taty Shantappa v Ratnabai [1949] 2 M.L.J. 18 (F.B.); Basangowda v Yellappa Gowda [1950] 1 M.L.J. 288 P.C.; Krishna Rao Kulkarni v Shrinivas [1950] 1 M.L.J. 292 P.C.

62. Amongst the Marathas, watan property had come to import any hereditary estate, office, privilege, property, or means of subsistence, a patrimony - See Wilson's "A Glossary of Judicial and Revenue terms" (1940) p. 889. This kind of tenure is now abolished.



Dhulappa's sons Punnappa and Hanamantappa separated and the Alnavar Watan with is lands went to Punnappa. Narayan separated from Punnappa in his lifetime.

After the deaths of the persons mentioned in the above pedigree in 1905, Bhikappa and his minor son Keshav were the only coparceners in the joint family. In 1905 Bhikappa died leaving a widow and Keshav. In 1908 Narayan died and his widow remarried and his separate property devolved by inheritance on Keshav. Keshav died unmarried in 1917. At that date Shankar a somewhat remote collateral being the nearest heir obtained possession of the suit properties from the collector in 1928 despite Gangabai's opposition. Gangabai adopted Anant in 1930 and instituted the suit on his behalf in 1932. The trial judge gave the decree in Plaintiff's favour but the High Court set it aside on the ground that as the coparcenary which existed at the time of B's death (1905) had come to an end on the death of Keshav (1917) and the family property had then vested in his heir, the subsequent adoption (1930) by B's widow, though valid, would not revive the coparcenary to divest Keshav's heir, and adopting widow

herself not being Keshav's heir. Their Lordships of the Privy Council held that as regards Watan lands a Hindu family cannot be brought to an end while it is possible in nature or in law to add a male member to it.[63] The family cannot be at an end while there was still a potential mother if that mother in the way of nature, or in the way of law (by adoption) brings in a new male member. Amarendra's[50] and Pratap Singh's[25] cases were followed. Sir George Rankin who delivered the Board's judgment reviewed the case-law then existing on the question of divesting by the adopted son. In Chandra's case[41] it had been held that on the death of a sole surviving coparcener, an adoption to the predeceased coparcener was ineffective to take the property which had belonged to the Joint family out of the hands of the former's heir and vest it in the adopted son. The decision was understood by the Board in Bhimabai v Gurunathgouda[64] to mean that the adoption was invalid. On Chandra's case[41] Sir George Rankin made the following observation

> "Of Chandra's case it should be remembered that Telang J. had in 1890 to reconcile two lines of decisions - those which following Sri Raghunad allowed an adoption to divest coparceners and those which, as in Bhoobun Moyee refused to regard as valid an adoption which would divest persons (other than the adopting widow) who had taken by inheritance. He had to find a dividing line and he drew the line at the death of the last surviving coparcener when the property passed by inheritance and not by survivorship. But Amarendra's case has profoundly modified the effect of previous decisions in cases of inheritance and the line of distinction need no longer be drawn in the same way".

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63. In fact the rule is general (i.e. not merely confined to Watan lands) and still correct.

64. [1932] L.R. 60 I.A. 25 at p. 40.

The reasoning in Chandra's case[41] was questioned by Seshagui Ayyar J. In Madana Mohana's case[42] and also by Venkatasubba Rao J. in Panyam v Ramalakshmamma.[43] After Amarendra's case[50] had cast further doubt upon it, a Full Bench of the High Court of Bombay had in Balu Sakharam v Lahoo Sambhaji[60] dealt with the matter. In that case as in Chandra's[41] case the property at the date of adoption to a predeceased coparcener had already vested in an heir of the last male holder nearer to him than a natural born son of the pre-deceased coparcener would have been. The present case, their Lordships observed, was different in that the Plaintiff, if he were an heir of Keshav was a nearer heir than the defendant. The learned Chief Justice in Balu Sakhuram's[60] case had dealt with both types of cases and held that in neither case did adoption have the effect of vesting the property in the adopted son. His view was that an adoption made after termination of the coparcenary does not vest in the adopted son the interest in joint family property which would have vested in a natural born son of the adoptive father, and also that Amarendra's[50] case had not disturbed the rule of law that an adoption by the widow of a divided Hindu does not divest any estate of inheritance unless the estate was then vested in the adopting widow as heir either to her husband or to a deceased son. The learned judges of the High Court who decided the present case in the High Court followed this Full Bench ruling. But their Lordships of the Privy Council observed that they must examine its correctness and for this purpose found it necessary to distinguish and separately consider two lines of reasoning. Upon the initial question of the validity of the Plaintiff's adoption, their Lordships rejected the view that Gangabai's

power to adopt came to an end on her son Keshav's death by reason that he was the sole surviving coparcener in the joint family. This circumstance would seem, upon principles declared in Amarendra's[50] case to have no bearing upon the continuance of Gangabai's authority, for, as stated by the Board in Vijaysingji v Shivsangji's case[57] "the power of a widow to adopt does not depend upon the vesting or divesting of the estate". Their Lordships on this point agreed with the majority of the Full Bench in Balu Sakharam's[60] case and were unable to support Ranguekar J. who had supported Chandra's[41] case. The learned judge seemed also to have considered it to be settled law (p. 572) that the widow's power to adopt could be defeated by a partition between coparceners, a view which had since been negatived by two High Courts on very cogent reasoning, Bajirao v Ramkrishna[65] and Sankaralingam v Veluchami.[66] Their Lordships of the Privy Council asked that if the adoption of the Plaintiff was valid, can it be held that it does not take effect upon the property which had belonged to the joint family because there was no coparcenary in existence at the date of the adoption? On this point their Lordships, differing from the majority decision in Balu Sakharam's[60] case held that the adoption being valid cannot be refused effect. That the property had vested in the meantime in the heir of Keshav was not of itself a reason, on principles laid down in Amarendra's[50] case, why it should not divest and pass to the Plaintiff. Keshav's right to deal with the family property as his own would not be impaired by the mere possibility of an adoption

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65. [1941] I.L.R. Nag. 707.

66. [1943] A.I.R. Mad. 43.

(cf. Veeranna v Sayamma).[67] But in his lifetime adoption by the widow of a collateral coparcener would have divested him of part of his interest and the same right to adopt, subsisting after his death must, in their Lordships' view, have qualified the interest which would pass by inheritance from him. Their Lordships posed the question "What principle requires that the death of the last surviving coparcener should prevent any further fluctuation of the interest to which he was entitled notwithstanding that a new male member has since then entered the family by adoption"? There was of course some convenience in bringing fluctuation to an end and there was force in the comment of Seshagin Ayyar J. on the Bombay decisions "The learned judges seem to regard the joint family as a quasi-corporation which loses this character by the death of the last male holder". (Madana Mohan v Purushottam).[42] A broader and more adequate view is taken by the Nagpur High court.[68]

> "We regard it as clear that a Hindu family cannot be finally brought to an end while it is possible in nature or law to add a male member to it. The family cannot be at an end while there is still a potential mother if that mother in the way of nature or in the way of law brings a new male member";

and in Pratapsingh's case,[25] Ameer Ali J. delivering the judgment of the Board held that the adopted son was the continuation of his adoptive father's line exactly as an Aurasa son, and that an adoption, so far as the continuity of the line was concerned had a retrospective effect.

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67. (1929) I.L.R. 52 Mad. 398, 402. This case has been criticized by Derrett in (1960) S.C.J. (J) pp. 43-57 and discussed subsequently in this Chapter at pages 312 et seq.

68. Bajirao v Ramkrishna, I.L.R. [1941] Nagpur 707 at p. 718.

In the present case the adoptive widow was mother of the last surviving coparcener. Her power to adopt could not have been exercised in his lifetime and if exercised after his death could not, as their Lordships thought, be given any less effect than would have attached to an adoption made after his death by the widow of a predeceased collateral. It must vest family property in the adopted son on the same principle displacing any title based merely on inheritance from the last surviving coparcener. In Balu Sakharam's case[60] the question whether adoption does not divest property in favour of adopted son was referred to a full bench in a double form (Q. II (a) and (b) C 1937) Bom. at pp. 543-4) according as the person in whom the property at the date of adoption had already vested was heir of the last male holder nearer or remoter than a natural son of the adoptive father would have been. In both forms the question was answered by the full bench in the negative because it was not considered that the adoption could be allowed to have any divesting effect after the coparcenary had come to an end. But, if, as their Lordships held, it could have such effect it became necessary to observe that remoteness from the last male holder had no relevance or effect as an answer to a claim by an adopted son to derive an interest in the family property from his adoptive father. As BhoobunMMoyee's[16] case was understood in Bengal (compare Faizuddin Ali Khan v Tincowri Saha)[69] it involved that no adopted son could claim as a preferential heir the estate of any person other than his adoptive father if such estate had vested before the adoption in some heir

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69. [1895] I.L.R. 22 Cal. 565 at p. 571.

other than the adopting widow. So too in Chandra's case[41] Telang J. understood it to involve that adoption by the widow does not divest the estate of one on whom the inheritance had devolved from a lineal heir of the husband. The question was whether, after Amarendra's case[30] these propositions still held good. Their Lordships in Anant v Shankar[58] thought that they did not. Fairzuddin's case[69] was among those cited in Amarendra's[30] case yet in Amarendra's[30] case it was held by the Board that the adoption divested Banamalai in whom Bibhudindra's estate /(Bibhudindra was the last male owner of an impartible estate, having died ummarried) had vested by virtue of family custom and in Vijaysingji's case[30] the Board stated the effect of previous decisions by saying that (at p. 165)

> "the adoption in that case which was made by a widow after the death of her natural son without leaving a son or a widow, was found to be valid though the estate had vested in a collateral of the son".

Neither Anant v Shankar[58] nor Amarendra's case[30] however, expressly (i.e. there was a concealed conflict) brought into question the rule of law considered in Bhubaneswari v Nilcomul[70] and stated by the Board to be that "According to the law as laid down in the decided cases, an adoption after the death of a collateral does not entitle the adopted son to come in as heir of the collateral". Their Lordships in Anant v Shankar[58] observed that in interpreting the decisions (in Amarendra's[30] and Vijaysinghji's cases) a certain difficulty arose from the absence in either judgment of a statement that the impartible estate descended as joint family property or as separate property and in Balu Sakharam's case[69] the learned Chief

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70. (1886) I.L.R. 12 Cal. 18.

Justice seemed to have thought that they were to be explained on the footing that a sort of coparcenary was subsisting. But their Lordships observed that this was not the explanation of either decision. On appeal to the Judicial Committee in Amarendar's case,[30] it was clearly argued and decided on the footing that the estate was separate property. The language of the Board's judgment in Vijaysingji's case[30] may be thought applicable to either of the two positions, but they clearly followed Amarendra's[30] case and they say that in the presence of the adopted son "the plaintiff cannot inherit the estate". The Zemindari property claimed in Amarendra's case[30] was adjudged to belong to the adopted son on the ground of his being heir of the last male owner. If the effect of an adoption by the mother of the last male owner was to take his estate out of the hands of a collateral of his who was more remote than a natural brother would have been and to constitute the adopted person the next heir of the last male owner, no distinction could, in this respect, be drawn between property which had come to the last male owner from his father and any other property which he may have acquired. (Sir George Rankin).

The rule of 'relation back'

The decision in Anant v Shankar[58] was followed by the Privy Council in Neelangouda v Ujjangouda[71]. Therein it was it was held that where an adoption by a widow of a predeceased coparcener takes place after the property had vested in the mother of the last surviving coparcener, who had also subsequent to such vesting adopted a son to her husband, the

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71. [1949] 1 M.L.J. 94 P.C.

subsequently adopted son was entitled to claim a half share from the previously adopted son. Also that a mere provision for the maintenance of the widow by the then head of the family of allotting some properties for her life will not affect her right to adopt. Their Lordships observed that the question of adoption by a widow after the death of the last surviving coparcener had come up for decision before a full bench of three learned judges in the Bombay High Court in Balu Sakharam's case.[60] In that decision it was held by a majority that the adoption in such a case was valid for spiritual purposes only and could not affect the property vested in the next reversioner. Commenting on this case, Sir George Rankin delivering the judgment of the Board in Anant v Shankar[58] had observed as follows:

> "If then, the appellant's adoption was valid, can it be held that it does not take effect on the property which had belonged to the joint family because there was no coparcenary in existence at the date of the adoption? On this point their Lordships, differing from the majority decision in Balu Sakharam v Lahoo Sambhaji,[60] held that the adoption being valid cannot be refused effect. That the property had vested in the meantime in the heir of Keshav is not of itself a reason, on the principles laid down in Amarendra v Sanatan,[50] why it should not divest and pass to the appellant".

In their Lordships view the present case, Neelangouda v Ujjangouda[71] fell within the principles of the decision by the Board in Anant v Shankar.[72]

In Basangowda v Yellappa Gowda[73] one D, a member

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72. (1943) 70 I.A. 232; I.L.R. [1944] Bom. 116; [1949] 1 M.L.J. 94, 96 P.C.; Also Tatya Sha tappa v Ratnabai [1949] 2 M.L.J. 18 (Federal Ct); Basangowda v Yellappa Gowda [1950] 1 M.L.J. 288 P.C.; Krishna Rao Kulkarni v Shrinivas [1950] 1 M.L.J. 292 P.C.

73. A.I.R. 1950 P.C. 24 (24, 25).

of a joint Hindu family, died in 1872, leaving a son S, who died in 1878 leaving his widow N, and the Joint family property passed to the collateral Y. Widow N adopted one B in 1933. It was held by the Privy Council, following Anant v Shankar[72] that B was entitled to a share of the joint family property with Y. So also the Privy Council held in R.K. Kulkarni v R.S. Kulkarni[74] that where a widow of a deceased coparcener adopts a son to her husband, the adopted son becomes entitled to a share in the coparcenary property notwithstanding that the coparcenary had come to an end before the date of the adoption

Rule of 'relation back' applicable to pre-adoption partitions also

Following Anant v Shankar,[72] the Federal Court of India in Tatya Shantappa v Ratnabai[75] observed that if, notwithstanding the extinction of the coparcenary by the death of the last surviving coparcener, the adoption by the widow of a predeceased coparcener could effectively divest the property vested by inheritance in the heir of the last surviving coparcener as held in Anant v Shanker[72], there was no reason why such adoption should not equally operate to entitle the adopted son to claim a share in the family properties in spite of the extinction of the coparcenary by virtue of a partition. There is no distinction in principle between extinction of a coparcenary by the death of the last surviving coparcener and its extinction by partition so far as the right of the

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74. A.I.R. 1950 P.C. 20 (21).

75. [1949] 2 M.L.J. 18 (F.C.).

widow of a predeceased coparcenar to make a valid and effectual adoption is concerned. The principle of their Lordships' decision must apply a fortiori to cases where the coparcenary became extinct by partition, for, the family properties would still be in the hands of the members of the family though divided and there would be no question of divesting property vested in a stranger to the family.

Exceptions to the relation back doctrine

In Jivaji v. Hanmant[76] a full bench of the Bombay

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76. A.I.R. 1950 Bom. 360, 361; I.L.R. [1950] Bom. 510. This decision has been criticized by Derrett as wrongly decided and fit to be over-ruled in an article entitled "Some Troublesome cases in Adoption" [1953] 55 Bom. L.R.J, 1 Derrett observes that Jivaji was heir, both to his father and to his father's brother's son, for this reason that when V died in 1918 his nearest heir was not his grandfather's brother's son but his father's brother's son, had a father's brother or any other nearer heir been alive at that time then Jivaji's claim would have been abortive.- Derrett opines that Jivaji should have been able not only to claim his father's estate from K, had he been adopted during K's lifetime (for a son is nearer heir than a brother), but also in actual circumstances to claim his father's brother's son's (V's) estate from Hanmant or anyone taking from Hanmant . The Supreme Court has however followed the decision in Jivaji's case in Shrinivas v. Narayan (A.I.R. 1954 S.C. 379) and Derrett observes in a subsequent article: An important Development in the law of Adoption [1955] 57 Bom. L.R. (J), 73, that the opinion expressed in his previous article requires to be corrected accordingly.

High Court held that the principle of relation back was not an absolute principle but it had certain limitations. For instance any lawful alienations made by the last absolute owner would be binding on the adopted son and also if the property by inheritance goes to a collateral, and the adopted son is adopted after the death of the collateral the adoption cannot divest the property which had vested in the heir of the collateral. Reliance was placed on the Privy Council decision in Rhubaneswari Debia v. Nilokomul[77] where it was expressly held that according to Hindu law "an adoption after the death of a collateral does not entitle an adopted son to come in as heir of the collateral". This principle was re-affirmed by the Privy Council in Anant v. Shankar.[72] In Mirza Raja v. Maharaj Kumar Vijaya Anand[78] their Lordships of the Allahabad High Court observed that the doctrine of relation back had two exceptions; the first was that it did not apply to the

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77. (1886) 12 I.A. 137; 12 Cal. 18 P.C.

78. I.L.R. (1952) 2 All. 421; A.I.R. 1952 All. (572).

case of succession to a collateral's property and the second was that it did not divest a person who had taken the property not by intestate succession, but by transfer inter vivos or by will of the father or other preferential heir who had taken the estate in the meanwhile. So far as collateral succession was concerned, their Lordships observed that there was a clear distinction between succession to a collateral, who had himself succeeded to the father, and held the father's property, and to succession to a collateral who died leaving his own property, which did not belong to the father. The exception applied to the latter case and not to the former. As regards transfer inter vivos or by will, it may be that the adoption cannot displace the title acquired under the will or other transfer. But it does not affect the rule of relation back of adoption to the father's death.

Also the Madras High Court held in Raju v Lakshmi Ammal[79] that the principle of relation back would not apply so as to divest from the heir the estate of the collateral line in whom it had vested as the adopted son was not in existence at the time the succession opened. It was confined only to lineal succession. In Pasala Rama Rao v Board of Revenue[80] it was held that the right to succeed to a hereditary office is not property and the relation back of an adopted son's right is only with regard to property. Though therefore the posthumous adoption cannot have the effect of divesting the incumbent of the office if an appointment had already been made by the Collector, but before an order of appointment

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79. A.I.R. 1954 Mad. 705.

80. A.I.R. 1954 Mad. 483.

is passed under S. 10 of the Madras Village Offices Act (1895) an adoption takes place then the adopted son can claim to be eligible for appointment as the next heir within the meaning of S. 10(2) of the Act.[81]

No divesting of estate inherited from collateral

The whole law relating to divesting by adopted sons was reviewed by the Supreme Court in the celebrated case of Shrinivas Krishnarao Kango v Narayan Devji Kango[82] which served to put an end to divesting of any collaterals who had succeeded to a propositus collateral to the adopted son, and were remoter than he in the order of succession, assuming that he was alive and competent to take the estate at the opening of the succession. This simplification of the law operated both in succession to males and that of females.[83] But the adopted son was still entitled to recover the whole property of his adoptive father, whether it be joint family property or separate property in order that the continuity of the line should be preserved in property as well as in name.

The following was the pedigree of the persons involved in the case

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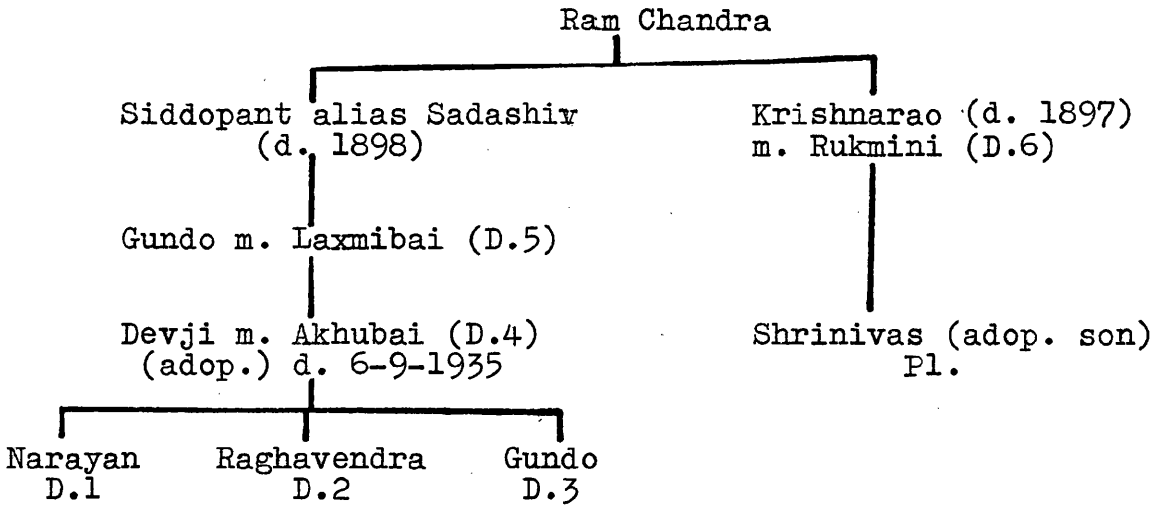
81. Madras Village Offices Act (1895) S. 10(2).

82. [1954] S.C.J. 408; 57 Bom. L.R. 678, A.I.R. [1954] S.C. 379; [1954] M.L.J. 630 S.C.

83. Sivagami v Somasundaram [1956] 1 M.L.J. 441; A.I.R. [1956] Mad. 323 (F.B.) and K. Ramakrishnayya v M. Narasayya [1956] An W.R. 1120 and the now somewhat out of date article by J.D.M. Derrett in (1955) 18 S.C.J. (J) 217 fl. See pages 412 et seq.



Siddopant (S) and Krishnarao (K) were members of a joint undivided family. K. died in 1897 leaving behind a widow R. (Def. 6 in the suit). S died in 1898 leaving him surviving a son G. who died in 1901 leaving his widow L (D.5) on 16th December 1901. L adopted Devji who died on 6 May 1935 leaving 3 sons, defendant 1 to 3 and a widow Akhubai (D.4) on 26 April 1944. On 29 June 1944 Rukmini, the widow of Krishnarao, adopted the Plaintiff Shrinivas, who instituted the present suit for partition claiming a half share in family properties. Siddopant and Krishnarao represented one branch of a Kulkarni family and were entitled for their share of the watan lands.[62] The other branch was represented by Swamirao, who was entitled for his half share of the Watan lands.

Swamirao died about 1903 issueless, and on the death of his widow shortly thereafter his properties devolved on Devji as his nearest agnate. The Plaintiff claimed that by reason of his adoption he had become a preferential heir entitled to divest Devji of those properties and sued to recover them from his sons. In the alternative he claimed a half share in them on the ground that they had been blended with the admitted joint family properties. The defendants

denied the truth and validity of the Plaintiff's adoption. They further contended that the only ancestral properties belonging to the family were the watan lands in the villages of U and K, that the purchases made by Siddopant were his self-acquisition, that the suit houses were also built with his separate funds and that the Plaintiff was not entitled to share therein. With reference to properties in Schedule C (inheritance from Swami Rao) they pleaded that the Plaintiff could not, by reason of his adoption, divest Devji of the properties which had devolved on him as heir. They denied that those properties had been blended with the joint family properties. Their Lordships made the following observations: In the Oxford Dictionary "collateral" is defined as meaning "descending from the same stock but not in the same line". In 1888 Golap Chandra Saskar Sastri observed in his Tagore law lectures on the law of Adoption

> "As regards collateral succession opening before adoption, it has been held that an adoption cannot relate back to the death of the adoptive father so as to entitle the adopted son to claim the estate of a collateral relation, succession to which opened before his adoption". (vide pp. 413 and 414).

The law was thus settled that when succession to the properties of a person other than the adoptive father was involved the principle applicable was not the rule of relation back but the rule that inheritance once vested could not be divested. Their Lordships observed that the ground on which an adopted son was held entitled to take in defeasance of the rights acquired prior to his adoption was that in the eye of law his adoption related back, by a legal fiction, to the date of the death of his adoptive father, he being put in a position of a posthumous son. The scope of the principle,

their Lordships observed, was clear. It applied only when the claim made by the adopted son related to the estate of his adoptive father. That estate may be definite and ascertained as when he was the sole and absolute owner of the properties or it may be fluctuating as when he was a member of a joint Hindu family, in which the interest of the coparceners was liable to increase by death or decrease by birth. In either case, it was the interest of the adoptive father which the adopted son was declared entitled to take as on the date of his death. The theory on which this doctrine was based was that there should be no hiatus in the continuity of the line of the adoptive father. That, by its very nature, could apply only to him and not to his collaterals. In deciding that an adopted son was entitled to divest the estate of a collateral, which had devolved by inheritance prior to his adoption, their Lordships observed that Anant v Shankar[58] went far beyond what had been previously understood to be the law. It was not in consonance with the principle well established in Indian Jurisprudence that an inheritance could not be in abeyance, and that the relation back of the right of an adopted son was only quoad the estate of the adoptive father. Moreover the law as laid down therein led to results which were highly inconvenient. When an adoption was made by a widow of either a coparcener or a separated member, the right of the adopted son to claim properties as on the date of the adoptive father by reason of the theory of relation back was subject to the limitation that alienations made prior to the date of adoption were binding on him, if they were for purposes binding on the estate. Thus transferees from limited owners, whether they be widows or coparceners in a joint

family were amply protected. But no such safeguard existed in respect of property inherited from a collateral. If, therefore, the adopted son was entitled on the theory of relation back to divest that property, the position of the mesne holder would be that of an owner possessing a title defeasible on adoption and the result of such adoption must be to extinguish that title and that of all persons claiming under him. The aliences from him would have no protection as there could be no question of supporting the alienations on the ground of necessity or benefit. And if the adoption took place long after the succession to the collateral had opened (in this case it was 41 years) and the property might have meanwhile changed hands several times, the title of the purchasers would be liable to be disturbed quite a long time after the alienation. The Courts, their Lordships opined, must hesitate to subscribe to a view of the law which lead to consequences so inconvenient. Their Lordships further observed that the claim of the appellant to divest a vested estate rested on a legal fiction and that legal fictions should not be extended so as to lead to unjust results. The decision in Anant v Shamkar[58] in so far as it related to properties inherited from collaterals was held as not sound and that in respect of such properties the adopted son could lay no claim on the ground of relation back.

Following Shrinivas's case[82] the Bombay High Court held that the doctrine of relation back had application only when the question related to the succession of the property of the adoptive father and not when it related to the succession

of the property of his collaterals.[84]

Relation back - divesting of estate - Limitations

The Andhra High Court has held that the right of the adopted son to claim properties as on the date of the death of the adoptive father by reason of the theory of relation back is subject to the limitation that alienations made prior to the date of adoption are binding on him, if they were for purposes binding on the estate. Thus, alienees from limited owners, whether they be widows or coparceners in a joint family, are amply protected. Where the estate has already vested by collateral succession, it is not divested by a subsequent adoption which takes place later than the opening of succession by reason of the doctrine of relation back.[85] In Shanmugavadivelu v Kuppuswamy[86] the Madras High Court held that in the case of collateral succession the adopted son would not be entitled to divest the title of persons who took the estate prior to his adoption. The principle of provisional vesting was confined only to lineal succession and there was no reason or justification to extend the principle. In this case a daughter took an absolute estate under the will of the father. The mother succeeded to the estate on death of the daughter as her heir. On subsequent adoption by the mother it was held that the adoption does not divest the mother of the estate and the adopted son

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84. Pralhad v Damodhar A.I.R. 1958 Bom. 79 (90).

85. Ramanna v Sambamoorthy A.I.R. 1961 Andh. Pra. 361 (365, 366) following A.I.R. 1954 S.C. 379.

86. A.I.R. 1955 NUC (Mad.) 2124.

had no right or title to the estate during her lifetime. In Singriah v. Ramanuja[87] it was held that as an adoption dates back to the date of the death of the adoptive father, a previous partition cannot prejudice the rights of an adopted son and if it does prejudice his rights, he is entitled to work out his rights ignoring the said partition.

Alienations made without necessity can be ignored by adoptee

The Mysore High Court observed in Chanbasayya v. Basayya[88] that whether an alienation made prior to an adoption, though not for legal necessity or family benefit, would be binding on the adopted son depended upon the question as to whether the alienor had the legal competence, at that time, to make the alienation. To the extent to which the alienation was lawful and valid at the time when it was made, it cannot be affected by the subsequent adoption. In Vasudev v. Jinnappa[89] it was held that an adoption made by a Hindu widow relates back to the death of the adoptive father and the adopted son has the right to succeed to the adoptive father's estate ignoring alienations unsupported by binding necessity. Consequently a gift of property made by one of the coparceners prior to the adoption cannot have any effect on the right of adopted son to the share of his adoptive

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87. A.I.R. 1959 Mys. 239 (241) (Pt.D) (Pr. 10).

88. A.I.R. 1961 Mys. 191 (192) (Pt.B) (Pr.4). For a further discussion of this topic see pages 494 to 501 In view of what I say at p. 500, I have to humbly submit that the decision on Chanbasayya's case[88] requires reconsideration.

89. I.L.R. [1960] Mys. 1380.

father in a partition of the family property.

So also it has been held that where, prior to his adoption, a valid surrender (which is a transfer in effect if not in law) has been effected by his adoptive mother the subsequently adopted son can divest the property which has already vested in the surrenderee.[91]

Emoluments of offices are property

In G. Brahmiah v. M. Venkaiah[92] it was held that lands forming emoluments of the offices of a carpenter and blacksmith were property and the adopted son could divest an heir in possession of service inam lands. In Krishnappagouda v. Basava[93] it was held by the Mysore High Court that when the sanction by the Government was, in its real nature, only a recognition by the Government for the purpose of the Kadian Inam Tenure that a person was the adopted son, then such person's rights in

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91. Bahubali Vasant Katage v. Gundappa Tatya Duge A.I.R. 1954 451 (454, 456) (F.B.).

92. G. Bramiah v. Venkaiah (1964) 1 Andh. W.R. 367.

93. I.L.R. [1960] Mys. 999.

respect of Kadim Inam lands could arise only from the date on which the recognition was accorded by the Government. Such recognition divests the interest in inam lands held by persons who were recognised by the Government before adoption. The Bombay High Court have held in Mahadeo Gopal v Rameshwar[94] that the adoption of the adoptee relates back to the date of death of his father and he is entitled to displace the titles acquired by inheritance by the successors. That however, does not mean that the successors who inherited the property took the estates as trespassers. They only took the estate subject to a contingency that by an adoption they may be divested. They are not trustees for the future adopted son. Therefore it cannot be said that the successors are trespassers and as such S. 51 of the Transfer of Property Act is not applicable to their case. On the other hand the successors are entitled to get compensation for improvement done by them on the property which the adoptee divested from them.

Adoptee's rights not affected by Sham Partition

The Supreme Court in a recent case[95] following the decision in Anant v Shankar[96] held (obiter) that the power of a Hindu widow does not come to an end on the death of the sole surviving coparcener. Neither does it depend upon the vesting or divesting of the estate, nor can the right to adopt be defeated by partition between the coparceners. The rights

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94. A.I.R. 1968 Bom. 323.

95. Mudigowda v Ram Chandra (1969) 2 S.C.J. 668. A case of sham partition between coparceners in order to defeat rights of adopting mothers.

96. (1943) 70 I.A. 232; I.L.R. [1944] Bom. 116, [1949] 1 M.L.J. 94 (P.C.).

of the adopted son relate back to the date of the adoptive father's death and the adopted son must be deemed by a fiction of law to have been in existence as the son of the adoptive father at the time of the latter's death. If, therefore, there was a coparcenary in existence when the adoptive father died, then whether it came to an end by the death of the last surviving coparcener or by subsequent partition among the remaining members, an adoption validly made by the widow of the deceased coparcener would have the effect of divesting the estate in the hands of the heir to the last surviving coparcener in the first case and of putting an end to the partition in the second case and enabling the adopted son to claim a share in the family properties as if they were still joint.

Doctrine of relation back justified

The doctrine of relation back, taken too literally, had got out of hand. The Supreme Court restored order, but, as we shall see, enough doubt and confusion was left even where the adoptee claimed nothing more than his adoptive father's properties. On the question whether the adoptee's rights arise on the date of adoption or relate back to the deceased adoptive father's death, the Smritis are silent. The rule of relation back of the adopted son to the property of his deceased adoptive father appears to be an equitable one, for the adoptee undoubtedly confers temporal benefit on his adoptive father i.e., in the continuance of his family name etc., and possibly spiritual benefit also. Besides the adoptee sacrifices his rights in the natural parents' family and it would but be fair and equitable that he should be given

similar rights in his adoptive family. One may well accept the theory that the line of the adoptive father should not be considered extinct as long as his widow is alive to continue the line by adoption - in which case the rule of relation back follows as a reasonable consequence. However there appears to be no reasonable ground why a widow should postpone adoption of the child indefinitely, especially when it is conducive to the spiritual and temporal benefit of her husband. If she postpones the adoption indefinitely or for too long after her husband's death, then in so far as devolution of the property of collaterals is concerned, his right should be placed on a par with the right of a son born after and conceived after partition (in case of a joint family), wherein he has to take things as they stand at the time of his birth and has no right to question alienations made before his birth. It is impossible to disagree with the Supreme Court's decision in Srinivas v Narayan.[97]

Adoptions by mother-in-law and daughter-in-law.

Man dying leaving daughters but no widow or son - his mother could adopt

In a case in Bombay,[98] following Amarendra's case,[30] it was held that where an adopted son who was the last male holder of Watan property and was entitled to it as his separate property died leaving two daughters but no widow, his mother could make another adoption after the property had

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97. [1954] S.C.J. 408: A.I.R. [1954] S.C. 379. Above p. 272 et seq.

98. Chanbasappa v Madiwallappa [1937] I.L.R. Bom. 642 and also Ramchandra v Mt. Yamuni Bai A.I.R. 1936 Nag. 65 F.B.

vested in the daughters by inheritance. It was therefore plain now, that the mere marriage of the son did not put an end to his mother's power of adoption, for unless he left a widow to continue the line, the mother's power to do so was not at an end.[99] So too, an adoption by a step-mother of the last male-holder dying childless was valid even though the mother of the last male holder was alive, and had the effect of divesting the estate vested in her.[100]

Custom permitting multiple adoptions

In Subramanian v Somasundaram[101] it was held by the Madras High Court that an exception to the rule that the mother's power of adoption was at an end when the son had left a widow, may by custom exist. It was a case of Nattukotai Chettis in the Ramnad district. A custom that both the mother-in-law and the daughter-in-law can make adoptions, though not proved as a custom of the community was held to be sufficiently proved as between the parties. Their Lordships observed that as pointed out by Golap Chandra Sarkar Sastri (Law of Adoption, Lecture V), when discussing Rungamma v Atchama,[102] Hindu opinion has long been divided on the question of multiple adoptions and where there are more widows than one - whether co-widows or daughter-in-law and mother-in-law - the sentiment in favour of each having a boy adopted by herself, though in

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99. Amarendra v Sanatan [1933] 60 I.A., 242, 250, 12 Pat. 442; approving Venkappa v Jeevaji [1901] I.L.R. 25 Bom. 306.

100. Maruti Dhondi v Guna Dhondi [1948] 49 Bom. L.R. 855.

101. (1936) 1 L.R. 59 Mad. 1064.

102. (1846) 4 M.I.A.I., 7 W.R. P.C. 57.

theory to her husband, has been pretty strong in the Hindu community. Amongst the instances spoken to in this case, there were one or two where a person adopted a boy even after the daughter-in-law had adopted a son, whereas under the Hindu law there could be no adoption when there is a grandson by adoption. The language employed by Lord Kingsdown in Bhoobun Moyee's[103] case seems to suggest that it is against the policy of law generally to permit an adoption by a mother-in-law after the estate had vested in daughter-in-law. In this view, their Lordships opined, that it might be said that a custom, even if established would be invalid as opposed to public policy. But as recent cases had not reaffirmed this ground but had based the termination of the mother's power on religious grounds, their Lordships observed that the possible objection based on public policy need not be examined. In Sooratha Singh v Kanaka Singh[104] where the question related to the existence of custom permitting the adoption of a brother's daughter's son, Sadasiva Ayyar J. referred to an admission made by the objector and on the authority of the decision in Ramlinga Pillai v Sadasiva Pillai[105] observed that

> "it was an admission both of the fact and of the validity of the defendant's adoption. The burden of proving that it was not valid was therefore shifted".

Their Lordships observed that an admission could of course be explained away, but the defendant had not seriously attempted

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103. (1865) 10 M.I.A. 279.

104. (1920) I.L.R. 43 Mad. 867.

105. [1864] 9 M.I.A. 510.

to do so in the present case. Again on a mere point of law an admission may not be of much significance, but where the question raised was one of custom, the position was different. Finally, as observed in Bhoobun Moyee's case,[106] where the person whose conduct is relied on could hardly have distinguished "between an adoption in fact and a legal adoption", and the facts ascertained in the case disproved the adoption, the presumptions arising from conduct may not be of any value, but it was recognised in the same passage that "upon a question which depended upon the preponderance of evidence", acts of acquiescence would be important. In the circumstances of the case, the adoption of one S by V (the mother-in-law) notwithstanding the existence of E (the daughter-in-law) in whom the estate of A (the previously adopted son by V who died leaving his widow E) had vested was held as a valid and proper one as between the parties and it would have the effect of entitling S to the half share to which P (the deceased husband of V) and A were entitled to in the common properties belonging to this branch. E not being a party to the suit, the rights of S, if any, as against her or against any son that she might take in adoption were left open.

In Gurunath v Kamalabai[107] the Supreme Court held that a widow's power to make an adoption comes to an end by the interposition of a grandson or the son's widow competent to continue the line by adoption. The power cannot be revived by the death of the grandson or son's widow. Their Lordships

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106. (1865) 10 M.I.A. 279.

107. (1955) 18 S.C.J. 178.

discussed the previous case law[108] and observed that the result of the series of decisions was that for about three-quarters of a century the rule that "the power of a widow to adopt comes to an end by the interposition of a grandson, or the son's widow competent to adopt" had become part of Hindu law, though the reason for limiting the power may not be traceable to any Shastric text. Their Lordships observed that it was well known that in the absence of any clear Shastric text the courts had authority to decide cases on principles of justice, equity and good conscience and it is not possible to hold that the reasons stated in support of the rule are not consistent with these principles. However as I have stated previously at p. 242, the adoption does lead to temporal benefit at least and there seems to be no equitable reason why the limitation should be placed by the courts on the widow's power of adoption earlier than her own death. In Bapuji v Gangaram[109] a Hindu died leaving a widow and his son and the son died leaving a widow only who remarried. It was held that the power of the mother revived on remarriage of the son's widow. This decision was followed by the Lucknow Court in Prem Jagat v Harihar.[110] Their Lordships in Gurunath's[107] case disapproved of these decisions as being based on a wrong apprehension of the true reasons stated for the rule in Amarendra's case.[99]

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108. Bhoobun Moyee's case followed in Thayammal and Tarachurn's cases, also Chandavarkai J's dictum in Ramkrishna v Shamrao approved in Madana Mohan's case and Amarendra's case applied in Vijaysingji and restated as a sound rule in Anant v Shankar (obiter). Also refer to my discussion of the rule above p. 241 to 242.

109. I.L.R. [1941] Nag. 178.

110. I.L.R. (1945) 21 Luck. 1.

Discussions by Derrett and Vaidyanathan

The questions of 'Adoption by a daughter-in-law and Divesting' have been discussed at length in two learned articles by Prof. J.D.M. Derrett[111] and Mr. S. Vaidyanathan.[112] The former article is a critique of various cases dealing with the subject and especially of Venkalakshmi v Jagannathan (minor).[113] The two main points decided in this case related to (i) the validity of adoption by a Hindu widow after her father-in-law's death and (ii) the effect of adoption on the proprietary rights of the mother-in-law in the estate held by her as the heir of her husband.

In this case the suit was by Jagannathan, the adoptee by the son's widow for possession or alternatively for partition and delivery of half share of entire estate of 'R' in the hands of Venkalakshmi, the widow of the last male owner (i.e., the mother-in-law). The suit was decreed in the first instance for the main relief and the defendant appealed to the High Court. Counsel for the widow maintained that though the texts afforded no direct guidance on the question under discussion, it had "other inner meanings" and that on the son's death issueless his father became 'sonless' and the religious duty which the latter owed to his departed lineal

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111. Adoption by a duaghter-in-law and Divesting: Derrett (1964) 1 M.L.J. 3.

112. Adoption by a daughter-in-law and divesting: S. Vaidyanathan: A.I.R. Journal 1967 (Sept.) 135.

113. A.I.R. [1963] Mad. 316. [In this case one S died issueless in 1925, leaving his widow and parents. His father R died without male issue in 1944 and the widow inherited his estate as sole heir. In 1952 the son's widow adopted 'J' with the consent of the husband's nearest sapindas. Next year the widow (of the father) purported to adopt a boy. The suit was by 'J' - see above].

ancestors, devolved on his death, on his wife to the exclusion of his daughter-in-law. Professor Derrett rightly observed in his above-mentioned article that the very texts which were pressed into service as imposing the duty of perpetuating the line on the widow operate with equal force to cast an exactly similar duty on her daughter-in-law as well. Between the two women, adoption by the daughter-in-law served the double purpose of bringing into existence not only a son to her husband but a grandson to the father-in-law equivalent in all respects to a son. Anterior adoption by widow will still leave the burden of adopting a son to her husband on the son's widow - an adopted brother being no substitute for a son. The learned judges refused to follow the only decision (Piare Lal v Hemchand)[114] which supported the appellant on the point. They dismissed it with the remark that it ignores the principle laid down by the Privy Council in Amarendra's[99] case that "the validity of an adoption is to be determined by spiritual rather than temporal considerations". On this aspect Prof. Derrett poses two questions (a) whether it is invariably true that a widow cannot adopt when any competent daughter-in-law lives? (b) Whether when a daughter-in-law has adopted, the mother-in-law is in all cases disentitled to adopt. As to the first question it did not arise in the case as the (later) adoption by the widow was found to be without the consent of nearest sapindas and therefore void. As to the second question, Ananthanarayan, J. (as he then was) stated that adoption by the widow "clearly could have no effect whatever", since by adoption of Plaintiff "the continuance of the line of

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114. A.I.R. [1938] Lah. 539.

Ramaswami Iyer had been firmly "secured". In the situation which arose in the case the duty fell on each woman on the death of her husband as 'aputra'.

Mr. S. Vaidyanathan in his article referred to above[112] opines that there is no limit of time for the performance of this duty. The mere existence of one widow is not in itself a impediment to a valid adoption by the other and so long as the daughter-in-law has not adopted, the mother-in-law is free to adopt. But, if, as happened in this case, the daughter-in-law adopts first, the mother-in-law loses her right to adopt. On the other hand the right of the daughter-in-law in this regard remains unimpaired notwithstanding a prior adoption by mother-in-law. In a Hyderabad case, Mukta Narahari v Mukta Rajiah,[115] wherein as the son's widow was inactive the father's widow adopted 'X' to F, the full bench of the Hyderabad High Court held that this case came within the rule in Gurunath's case[107] and that the presence of the son's widow was fatal to any claim to adopt on the part of her mother-in-law, and that the adoption was thus invalid. Mr. S. Vaidyanathan observes that this view of the Hyderabad High Court was erroneous. The view enunciated by the Supreme Court in Gurunath v Kamalabai,[116] observes the author, was confined to cases where the son survives the father and the extension of the rule to other situations was impermissible. In Gurunath's case[116] after the father's death, the son, the son's widow and the son's son died in succession leaving the mother as the sole heir. The situation, was from the religious point of view very serious. But the Supreme Court refused to uphold the adoption

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115. A.I.R. (1957) Hyd. 1 (F.B.).

116. [1955] 1 M.L.J. (S.C.) 91; [1955] S.C.J. 178.

by the mater familias, made presumably to avert the extinction of the family. It was pointed out that the principle applicable was that laid down in Amarendra's case.[99] The mother's power to adopt was lost when the son died leaving his son and widow and was not revived by subsequent deaths. Prof. Derrett in his article[111] observes that the ratio of the Supreme Court decision in Gurunath's case[116] was applicable to Venkalakshmi's case[113] also. Thus the daughter-in-law was held competent to adopt X and once the purpose of adoption had been satisfied and the spiritual benefit had been secured to F, there was no longer any possibility of the widow's adopting. But the question remains, observes Derrett, is it invariably true to say that a widow cannot adopt (under the pre-1956 system) while any competent daughter-in-law (or grand daughter-in-law) lives? And he answers, that the Supreme Court decision referred to above gives us to understand that this is so. This leads to the inconvenience that if the daugher-in-law died without adopting or she adopted and both she and the adopted son died, the mother-in-law would be deprived for ever of her power of adopting with sad effects both in human and economic terms. He further observes that according to the Supreme Court view they must apply stare decisis and it would be up to Parliament to remedy the matter - which it shortly afterwards did for all adoptions after the enactment of the Hindu Adoptions and Maintenance Act 1956.

According to Mr S. Vaidyanathan,[112] however, in cases like Venkalakshmi's[113] and Mukta Narahari's[115] it is not possible to state on the facts that "the duty of providing for the continuity of the line for spiritual purposes which was upon the father had been assumed by the son and by him passed

on to his widow, so as to bring the mother's power to adopt to an end" (per Sir George Lowndes in Amarendra's case, A.I.R. 1933 P.C. 155). Mr. S. Vaidyanathan further observes that the opinion expressed by Prof. Derrett that if in the Madras case (Venkalakshmi's case),[113] the widow had adopted first instead of the son's widow the adoption would be invalid is incorrect. Both these learned authors also refer to the case of Sahebrao Madhavrao v Rangrao Dadarao[117] wherein the Bombay cases (Pandurang Bhau v Changunabai[118] which followed Anant v Dnyaneshwar)[119] and the Hyderabad full Bench case (Mukta Narahari's case)[115] came to be reviewed. In this case a father F had two sons S_1 and S_2; S_1 died in F's lifetime leaving S_1W his widow. F then died leaving his own widow W, S_1W and S_2. Then S_2 died. W adopted X in March 1950. S_1W adopted Y in July 1950. The Court was impressed by the reasoning of the earlier Bombay cases and read the judgment of Gurunath's case[107] in the Supreme Court in that light.

> "The earlier decisions made it clear that the widow whose interposition was held to terminate the mother's power of adoption was the widow of the son who was the last male holder".

If the father leaves several sons and dies leaving his widow and if each of these sons adopts, the mother-in-law has several adoptive grandsons (hence she can have an adopted son and adopted grandson). According to the decision in this case both the mother-in-law and daughter-in-law might adopt, which view according to Derrett is wrong. But Vaidyanathan opines

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117. [1960] 63 Bom. L.R. 411.

118. A.I.R. [1945] Bom. 164; I.L.R. 1945 Bom. 487.

119. (1943) 46 Bom. L.R. 353.

that in this case, wherein the facts were similar to the Madras case with the important difference that the mother-in-law was the first to adopt, it was rightly held that both adoptions were valid. The second situation is exemplified by Bhoobun Moyee's case[116] and Pandurang Bhau v Changunabai[118] which followed Anant Govind's case.[119] In the case of Anant v Dnyaneshwar[119] the father died leaving a widow W and son S, married to S_1W and an unmarried son S_2. S_1 died and then S_1W died, leaving S_2 who then died unmarried. W was left the sole representative of her family. W adopted and it was held by the Bombay High Court that the adoption was valid. For when W adopted there was no daughter-in-law upon whom rested the duty to prolong the line. According to Derrett, Anant Govind's[119] case was wrongly decided although it is technically correct as this case was before the Supreme Court decision in Gurunath's case.[107] The inconvenience that the family would be totally deprived of the right of self-prolongation was specifically contemplated in Gurunath's[107] case but the Supreme Court refused to uphold the adoption by the mater familias on the ground that the mother's power to adopt was lost when the son died leaving his son and widow and was not revived by subsequent deaths.

It may humbly be submitted that this view of the Supreme Court is incorrect. As rightly observed by Prof. Derrett, it would have sad effects both in human and economic terms and as Mr. Vaidyanathan opines there should be no limit of time for the performance of this duty. The Smritis are silent on the point and the natural limitation is the death of the widow herself. The limitations put up by the Courts seem to me to be against the principles of natural justice

and equity and opposed to the principle of spiritual benefit recognised in Amarendra's case,[99] and hence against the spirit of Sastric law also.[107] In Pakistan, Burma and Malaysia Gurunath's case may not be followed.

Relation back as to coparcenary and separate property distinguished by Madras High Court

Next as to the legal consequences arising out of adoption and its impact on property rights, the decision of the Court in Venkalakshmi's case[113] was that the adoptee was entitled to divest the grandmother of only half-share in joint family property and could claim no rights in the self-acquired property of the grandfather. Prof. Derrett crticizes both these points and Vaidyanathan fully agrees with him. As to joint family property it was settled by a long line of authorities from Raghunadha v Brozo Kishore[49] to 70 I.A. 232: A.I.R. [1943] 196 (P.C.) that a person adopted by a predeceased coparcener's widow is treated, as having the same interest in coparcenary properties that his adoptive father had at the moment of his death. The interest is however, subject to the usual fluctuations resulting from deaths and births and adoptions in the family, and the family itself is not considered extinct so long as there lives a potential mother in the person of the widow of a coparcener. The Madras High Court have held in the instant case that the character of the properties inherited by his heir undergoes a transformation, a half share acquires the attributes of separate property and the other half share alone retaining the essential features of a coparcenary with liability to defeasance on adoption. Vaidyanathan observes that a careful study of the Supreme

Court decision in Srinivas v Narayan[82] would show how artificial and anomalous is the theory involved in the Madras High Court decision; the entire tenor of judgment of the Supreme Court militates against the soundness of assumptions underlying the High Court decision. The true legal position emerging from Anant v Shankar[58] as elucidated and clarified by the Supreme Court in Srinivas v Narayan[82] is stated by Veeraswami J. thus

> "If in a joint family consisting of two brothers A and B; A died leaving his widow W and later B the surviving coparcener also died leaving his widow but no son, and thereafter W adopted X, the adoption would confer upon X the rights to the estate in the hands of the widow and the adopted son X would be entitled to divest B's widow"

and Vaidyanathan remarks that there is clearly no indication in this statement of law that the adopted son's right of divesture is limited to half share in the estate. Prof. Derrett also holds the view of the Madras High Court on this subject as clearly wrong. He observes that on the subject of the rights of a son validly adopted even after the enactment of the Hindu Adoption and Maintenance Act, 1956 doubts persist. In one view he cannot obtain a birth right in the joint family property of his deceased adoptive father since relation back has been abolished; in another view (since corroborated by the Supreme Court of India) the statute interferes as little as possible with the law of the joint family and if a widow adopts she will adopt to herself so far as her own property is concerned, but also give effect to the Mitakshara birthright so far as joint family property is concerned. That the adopted son might be a coparcener with adoptive uncles and cousins had already been established by the Federal Court in

Tatya Shantappa v. Ratnabai[120] and his right to divest joint family property from the hands of anyone taking it as a sole surviving coparcener or as heir or successor to such a coparcenary had been placed beyond doubt by the Supreme Court in Krishuamurthi v. Dhruwaraj,[121] which was decided on May 5, 1961 and reports may not have been available when the instant case was argued before the Madras High Court judges.

To the argument on behalf of the adopted son that the Mitaksharn birth right does not stop with the adoptive father but extends to the joint property as such, Anantanarayan, J. said (p. 326, Col. 2)

> "But this argument appears to us to ignore the true principle as stated repeatedly in Shrinivas's[82] case. The following sentences, in particular, are very significant 'Thus far, the scope of the principle of relation back is clear. It applies only when the claim made by the adopted son relates to the estate of his adoptive father'. Again, 'it is the interest of the adoptive father which the adopted son is declared entitled to take as on the date of his death'. Also with respect to Amarendra's case.[99] Venkatarama Ayyar, J. observes: 'This decision might be taken at the most to be an authority for the position that when an adoption is made to A, the adopted son is entitled to recover the estate of A not merely when it has vested in his widow who makes the adoption, but also in any other heir of his. It is no authority for the contention that he is entitled to recover the estate of B. which had vested in his heir prior to his adoption to A'. But that is precisely the position here...".

The interest of F, which was that of a sole surviving coparcener, had vested in W, prior to the adoption and it appeared only, what would have been the son's interest (one half) could be claimed by X. This view was clearly expressed in more or less identical terms at p. 327, col.1, in the judgment of

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120. [1949] 2 M.L.J. 18. (F.C.)

121. A.I.R. 1962 S.C. 59.

Veeraswami J. at p. 334-335, which Derrett rightly observes as being wrong.

What the Supreme Court undoubtedly meant in Shrinivas's case[82] was that the adopted son was entitled only to the property of his male lineal ancestors, whether of father or grandfather and not a collateral. All emphasis is upon contrast between line of the father, which is being prolonged and which of course is also the line of the father's father, the the lines of collaterals which are unaffected by the doctrine of adoption. Derrett remarks that the ratio of the leading Supreme Court is so clear that it is difficult to grasp how such literal adherance to the word 'father' could have been urged upon the Court. Shrinivas's case,[82] as it happened, was an instance of the most usual situation, where the generations die in the natural order, but the principle that an adopted son is adopted grandson of his adoptive father's father is beyond question. That the principle should have escaped the learned judges was unexpected, seeing that they have already admitted that the reason why a widow cannot adopt once her daughter-in-law has adopted is that as soon as that happens the widow's deceased husband is not 'sonless' i.e. he has a grandson, 'male issue'.[122]

As to the adoptee's divesting of the separate properties of the grandfather, both the judges had no doubts but that he must fail, as the adoptive father himself had no rights in them at the time of his death and the rights acquired by the heir-at-law of the last male holder by inheritance are

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122. See p. 323, Col. 2, in the case, the citation from G.C. Sarkar Sastri.

unimpaired by subsequent adoption[122a]. With this view both Derrett and Vaidyanathan rightly disagree. Prof. Derrett says that just as the adopted son is grandson of the deceased grandfather who survived the adopted son's adoptive father and is grandson for the purpose of being a coparcener and following coparcerner property, so he is equally and by virtue of the same relationship entitled to the grandfather's separate and self-acquired property, for he traces his title by'birth alone', as do all Mitakshara male issue and not by

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122a. A similar erroneous view has been held in a recent case by the Allahabad High Court in Arjun Singh v. Virendra Nath, A.I.R. 1971 All 29, 38. In this case it was held (obiter) that the son can only divest ancestral or coparcenary property and not the self-acquired property of the grandfather. Further, even in the event of a valid adoption by the daughter-in-law (whose husband had predeceased D the grandfather), the adoption could not have had the effect of divesting K and C (the daughter) of the interest which already vested in them respecting such property of D, the grandfather, as was his self-acquired and exclusive property. This decision seems to be erroneous for a coparcenary is constituted between a person and his father, grandfather and great-grandfather and the self-acquired property of the grandfather becomes ancestral property vis-a-vis his son, grandson and great grandson. The discussion which follows applies to this case as well.

way of his immediate adoptive relationship to his adoptive father. If one thing is certain about the Mitakshara family, says Derrett, it is that the spiritual 'haven' or 'state' even of living male lineal ancestors is elevated by births of male issue and the idea of birth of a son who is not ipso facto equally grandson and great grandson is ridiculous. For Manu says(IX, 137).

> "Through the son one conquers the worlds; through the grandson one attains immortality, and through the son's grandson one obtains the regions of the Sun".

This text of Manu also appears in Vishnu and Vasishtha and has been cited from Sankha-Likhita and Harita.[123] Shrinivas's[82] case makes no sort of distinction between separate and self-acquired property and joint family property. Krishnamurthi's case[124] explicitly equate both classes of property. Principle No. IV set out in the judgment says:

> "The estate may be definite and ascertained, as when he is the sole and absolute owner of

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123. 170 ff. of Vol. II of G. Jha's: Hindu Law in its Sources, All. 1933.

124. A.I.R. 1962 S.C. 59.

properties or it may be fluctuating as when he is a member of a joint Hindu family".

The adoptive descendant represents his ancestors as well in the first category as in the second, therefore, says Derrett, Jagannathan should have obtained the entire self-acquired property of deceased R. Iyer, his grandfather, divesting Venkalakshmi, the widow except for any property other than an interest in agricultural land, which latter would be subject to the statute of 1937 and would be shared with the widow. Prior to 1956, observes Derrett, i.e. the period prior to Venkalakshmi's[113] case (A.I.R. 1963 Mad. 316) the situation of the son would have been even clearer. The self-acquired property of first his father and then his grandfather would have come to him subject to the Act of 1937. The position of the adopted son could not be worse than that of an Aurasa son in regard to the property of his male lineal ancestors and that is the position established in the Supreme Court cases and unfortunately overlooked in Venkalakshmi's[113] case.

Mr. Vaidyanathan agrees with the above view of Prof. Derrett. He says that the principle of relation back is in conflict with the principle of Jurisprudence 'inheritance is never in abeyance'. Amarendra's[99] case (a case of inheritance as distinguished from survivorship) established that the adopted son was entitled to divest not only the widow but any other heir of such holder. But there was further extension of this rule by Anant v Shankar[58]. One part of this decision, which dealt with the separate properties of a collateral, says Vaidyanathan, created an intriguing situation. In so far as it held "that an adopted son is entitled to divest the estate of a collateral which had devolved by inheritance prior to

his adoption "it did" go far beyond what had been previously understood as the law". The value of the Supreme Court decision, observes Vaidyanathan, lies in the bold lead it gave by over-ruling that portion of Anant v Shankar[58] which went beyond limits of what till then was understood as the law on the subject. Their Lordships of the Supreme Court observed that "the theory on which the doctrine (of relation back) is based is that there should be no hiatus in the continuity of the line of the adoptive father. This is in accordance with the principle stated by Mr. Ameer Ali in Pratap Singh's case[25]

> "that an adopted son is the continuator of his adoptive father's line exactly as an Aurasa son and that an adoption, so far as the continuity of the line is concerned has a retrospective effect, that whenever the adoption may be made there is no hiatus in the continuity of the line".

If the legal position be as stated above, it is difficult to say, comments Vaidyanathan, that in Venkalakshmi's[113] case, Jagannatham is not entitled to the separate property of Ramaswami. A son of a predeceased son is indubitably a nearer heir than the widow. The vesting of the estate in the latter was only provisional and adoption brings about the defeasance.

The point was put beyond doubt by the subsequently reported decision of the Supreme Court in Krishnamurthy v Dhruwaraj[125]. As stated in the opening paragraph of the judgment, the case directly raised "the question whether D, the respondent, on his adoption, divested the defendants' Appellants, of the properties of his adoptive father and grandfather". I agree with the views of Mr. Vaidyanathan

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125. A.I.R. 1962 S.C. 59.

and Prof. Derrett, and a careful study of the Supreme Court decisions referred to above would show the artificial and anomalous theory involved in the Madras High Court decision, for the entire tenor of judgment of the Supreme Court militates against assumptions underlying the High Court decision.

Divesting of Property vested in a sole surviving coparcener

In the pre-1956 period, provisional heirs and limited heirs were well-known, the divided coparcener, the sole surviving coparcener and the widow holding a title under the limited estate were the typical examples and those who dealth with them otherwise than upon sufficient bona fide enquiry, knew that upon action being taken by someone interested in the estate, someone who perhaps might not even be alive at the time of the transfer[126] of the estate might be divested without notice or compensation. The collateral heir, inheriting from an absolute owner and to all appearances by an absolute title, was in a different position, alienees from him had no notice of a defect in his title and were not on their guard. Thus the collateral was of a different class from the coparcener, manager or widow under the pre-1956 era.

Alienation of property without necessity could be divested by subsequently adopted son

A sole surviving coparcener who alienated without

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126. Panchaiti v Surajpal Singh A.I.R. 1945 P.C. 1: [1944] 2 M.L.J. 395 (P.C.); Shiva Ji Ganpati Muthal v Murlidhar Daji [1953] 56 Bom. L.R. 426; F.B. The rule is fully accepted in Andhra [1956] An. W.R. 1067 (K. Seshamma v P. Venkayya).

justifying necessity prior to the adoption of a son by a widow of a predeceased coparcener who died prior to the partition, gave only a provisional title, provisional until all widows then capable of adoption had died or lost their power to adopt, and the adopted son could divest transferences of property who had taken for purposes which would not have been binding upon his had he been alive and a coparcener at the relevant moment. The principle was clear enough. The adoptee was treated like a posthumous child. A posthumous child could recover his father's share from coparceners who divided after his father's death, subject to binding alienations. In the same way the posthumous son could divest aliences from a sole surviving coparcener, as he could from an heir, such as his own adoptive mother. The coparceners held provisionally as long as a widow lived who retained the right to create a new coparcener retrospectively by adoption, and the sole surviving coparcener, like any heir, though hardly by so strong a title, held provisionally in the same circumstances.

The logic of this proposition extended to testamentary dispositions by the sole surviving coparcener and both legacies and sales, mortgages and exchanges, not to speak of gifts would be upset when a son was adopted by the widow of a predeceased coparcener. This logic has been admitted in several cases[127] and the best of the series dealing with the subject is the case of Potharaju Pardhasaradhi Rao v Potharaja Srinivasa Sarma[128] wherein the Andhra Pradesh High Court

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127. For example Udhao v. Bhascar [1946] I.L.R. Nag. 425, 427; Krishtappa Venkappa v. Gopal Shivaji [1956] 59 B.L.R. Bom. L.R. 176 (F.B.). The decision in Kristappa's case has been criticized by Derrett in an article entitled: Recent decisions and some queries in Hindu Law -- 8 Divesting by an adopted son; [1960] 62 Bom. L.R., J, 31-32.

128. A.I.R. [1959] Andh. p. 512; [1959] 2 An. W.R. 341.

followed the Bombay Full bench decisions in Ramchandra Hanmant v Balaji Dattu[129] and Krishtappa Venkappa v Gopal Shivaji.[130]

View that the right of the adopted son to recover properties should be limited to cases of inheritance and not of alienations.

In Pardhasardhi Rao v Potharaja's case,[128] their Lordships of the Andhra Pradesh High Court observed that the principle is that the male line is not regarded as extinct, or the man to have died without issue, until the continuation of the line by adoption becomes impossible, that the adoption has retrospective effect and that whenever an adoption is made, there is no hiatus in the continuity of the line (vide Pratapsingji's[25] and Neelangouda's[59] cases). Thus, there can be little doubt, say their Lordships, that the adopted son has a right to get the share of his adoptive father from other coparceners in possession or from one who has acquired it by the law of inheritance, and further that, the right of the adopted son should be limited to displacing of titles acquired by inheritance and not to those acquired by outsiders in other ways. In other words, the adoption by a widow of a deceased coparcener would not affect dispositions made by a person holding the estate. The rule that an adoption dates back to the date of the death of the adoptive father has no application to a case where the last male holder has disposed of the property since the sole surviving coparcener is always

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129. [1955] I.L.R. Bom. 837; 57 Bom. L.R. 491; A.I.R. 1955 Bom. 291 (F.B.).

130. [1956] 59 Bom. L.R. 176 (F.B.).

regarded as the owner of coparcenary property and as such it is within his competence to alienate property either for necessity or by way of gift. When an estate is divested by a subsequent adoption, the adopted son takes the estate subject to the alienations made by the holder for the time being. Their Lordships discussed the case law on the subject beginning with the well known case of Veeranna v Sayamma.[131] In that case a father and his son constituted a Hindu joint family. The son predeceased the father leaving behind him a widow but without any issue. The father as the sole surviving coparcener settled all the properties on his daughters. The son's widow then adopted a boy who brought a suit claiming a half share in the properties on the ground that his adoption relates back to the death of his adoptive father. This contention was repelled and the suit was dismissed. It was laid down by the Bench consisting of Odgers and Venkata Subba Rao, J.J., that the survivor could alienate all or any of the family properties absolutely and the adopted son could not question the alienations and could take only what remained unalienated. Odgers J, stated the principle thus:

> "It seems to me that a sole surviving coparcener has always been regarded as the owner of the coparcenary property. The theory of relation back has only to do with establishing a line of succession to the adoptive father and in order to establish that line it is necessary that certain intermediate holders should give way to the adopted son's superior claims as that of a natural born son of his adoptive father ... But within these limits he can so to speak insist on the property devolving in a direct line as far as possible from father to son or from grandfather to grandson and it is in this connection and this alone that the doctrine of relation back and the cases I have quoted

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131. [1929] I.L.R. 52 Mad. 398.

> in the first category of inheritance are to be regarded. What authority there is with regard to alienations by a male holder, are strongly, and it seems to me conclusively against the contention argued by the appellant".

The legal position was summed up thus by Mr. Justice Venkata Subba Rao:

> "The theory is that a Hindu cannot be said to have died without male issue, until the death of the widow, makes adoption impossible; in other words, so long as the widow is alive, there is the possibility of an heir coming into existence (West & Buhler, 4th edition 890 - Pratap Singh's case, I.L.R. 43 Bom. 778: (A.I.R. 1918 P.C. 192))".

Odgers J. quotes a passage from Mayne (Para. 198; 9th edition). This paragraph of Mayne comes after a discussion on the power of an adopted son to challenge alienations made prior to his adoption by the widow who adopts him:-

> "It would be intolerable that he should be prevented from dealing with his own, on account of a contingency which may never happen. When the contingency has happened, it would be most inequitable that the purchaser should be deprived of rights which he obtained from one who at the time, was perfectly competent to grant them".

Their Lordships in Pardhasaradhi Rao's case[128] observed that the rule contained in these passages represents the correct law. It may however be mentioned that Mr. Varadachariyar (Counsel for appellant in Veeranna's case[131]) had challenged the accuracy of this absolute statement and undertook to show from authoritative cases that it needed considerable modification. But their Lordships doubted whether the expression "an estate subject to defeasance" used by Seshagiri Ayyar in Madana Mohana v Purushothama[132] was the correct expression to apply to an estate of this kind. According to this theory with respect to the surviving member of a coparcenary in the

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132. [1915] I.L.R. 38 Mad. 1105.

position of the grandfather in this case is that so long as the power to adopt is outstanding, he has really only got an absolute estate in half, because, if and when an adoption takes place the adopted son becomes immediately a coparcener with himself, entitled to half the property on partition. The question was whether this theory was supported by decisions and even supposing it was so supported, was it to apply to alienations made by the adoptive grandfather before the adoption took place? Their Lordships in Veeranna's case[131] observed that it was settled that an after-born aurasa son cannot question the alienations made for example by the manager of the coparcenary, his father prior to his birth and it seemed startling to their Lordships, if it was true that an adopted son should be in a better position. The earliest case to which their Lordships' attention was drawn was that of Bamundoss Mookerjea v Mst. Tarinee.[133] It was a case wherein the Sudder Dewany Adawlut delivered a very full judgment covering a number of points in the law of adoption and which the Privy Council adopted almost in its entirety. That decision, inter alia, laid down that until a widow exercised the power of adoption vested in her, she is possessed of the property from the death of her husband and can, therefore, sue in her character as widow in order to claim succession to the estate of her husband in spite of the fact that she possesses an unexecuted power of adoption. In Bhoobun Moyee's we have an example of the limit to the power to adopt.[134]

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133. [1858] 7 M.I.A. 169.

134. See ante page 235 et seq.

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In Lakshmana Rau v Lakshmi Ammal[135] where Bamundoss Mukherjee's case is relied on as an authority for the proposition "that an authority to adopt a son possessed by a widow doesnot supersede or destroy her personal rights as widow and that those rights continue in force until an adoption is actually made", it was held that the title of an adopted son does not relate back to the death of the widow's deceased husband. In Pratap Singh's case[25] the Privy Council held that there was no hiatus in the continuity of the line and that so far as this was concerned, the adoption had a retrospective effect. It seems from an examination of the cases, observes Odgers J., that the only case in which it can be said that the adopted son can, on the theory of relation back, object to alienations made before his adoption, is confined to the case of alienations by a widow. Venkatasubba Rao J. referred to two cases where the point directly arose. The first case was Sivagnanam v Ramasami Chettiar[136] in which Arnold White C.J. and Phillips J. held that the adopted son took the property subject to the mortgage created by the intermediate holder and remarked that this case was a direct authority against the appellant's contention. The second case was Maharaja of Bobbili v Zamindar of Chundi.[137] The case related to impartible Zamindari. Certain debts incurred by an intermediate holder were held binding on an adopted son who divested the former's estate and it became unnecessary to decide whether an intermediate holder was full owner. His Lordship observes

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135. (1881) I.L.R. 4 Mad. 160.

136. [1911] 22 M:L.J. 85.

137. (1910) I.L.R. 35 Mad. 108; 21 M.L.J. 593.

> "In the view I take, it makes no difference whether the alienation was or was not for value, though I may state that I regard the alienation in the present case as purely voluntary".

Finally Odgers J. referred to the case of Krishnamurthy v Krishnamurthy,[138] wherein their Lordships of the Privy Council say as follows (Lord Dunedin delivering the judgment of the Board)

> "When a disposition is made inter vivos by one who has full power over property under which a portion of that property is carried away, it is clear that no rights of a son who is subsequently adopted can affect that portion which is disposed of. The same is true when the disposition is by will and the adoption is subsequently made by a widow who has been given the power to adopt. For the will speaks at the death of the testator and the property is carried away before the adoption takes place".

It was suggested (by counsel for Appellant in Potharaju's case[128]) that the decision of their Lordships cannot stand in view of what was said in their earlier decisions but Odgers J. observed that construing the earlier decisions quoted by him, apart from those references to alienations by a widow, as applying entirely to matters of inheritance i.e. continuity of the line, divesting an intermediate holder, the fiction that the adoption is a deferred act by the father, that his life is prolonged in the widow or that the adoption relates back, it would be seen that all these fictions were simply introduced for the purpose of introducing a new heir into the succession, the ordinary rule being that when succession opens there must be somebody to catch the property when the previous holder relaxes his possession of it. Their Lordships further observed that it could not be concluded that the Privy Council

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138. [1927] I.L.R. 50 Mad. 508 (P.C.).

in Krishnamurthi's case[138] were oblivious of their previous decisions and that their Lordships must clearly be held to distinguish the case of interference with alienations from cases of divesting on the theory of relation back or any theory of continuity of succession or no hiatus in the line as they put it in Pratap Singh's case.[25]

Their Lordships in Pardhasaradhi Rao's case [128] referred to the opinion of Reilly J. in Sukhdevdoss v Mt. Choti Bai[139] as being in consonance with this rule. The learned judge observed:

> "It has been recognised clearly by the Privy Council in Krishnamurthy Ayyar v Krishnamurthy Ayyar[138] that, when by his will the husband has disposed of part of his property that disposition cannot be affected by the adoption of a son after his death, and a similar effect must follow, in my opinion; from the disposition by will of the whole of his property which in that case cannot be affected by a subsequent adoption".

Their Lordships in Pardhasaradhi Rao's case[128] next referred to Anant v Shankar[140] where the limitation to the doctrine of relation back was also recognised which approved of the decision in Veeranna's case:[131] Their Lordships (in Anant v Shankar[140]) stated:-

> "Keshav's right to deal with the family property as his own would not be impaired by the mere possibility of an adoption. But ... the same right to adopt subsisting after his death must have qualified the interest which would pass by inheritance from him".

Referring to Srinivas v Narayan[82] their Lordships in Pardhasaradhi Rao's case[128] observed that the authority of Anant v Shankar[140] had been to some extent impaired by the judgment of the

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139. A.I.R. [1928] Mad. 118.

140. A.I.R. [1943] P.C. 196.

Supreme Court in Srinivas's case.[82] But the disagreement was only with regard to one aspect of the matter, namely the rights of the subsequently adopted son to collateral succession. Differing from Anant v Shankar[140] the Supreme Court held in Srinivas v Narayan[82] that the adoption after the death of a collateral does not entitle the adopted son to come in as the heir of the collateral. In other respects, their Lordships observed, the decision still holds the field. Their Lordships in Pardhasaradhi Rao's case[128] noticed various rulings[141] which contained a view similar to that adumbrated in Veeranna v Sayamma[131] and those which followed it, and lastly cited the case of Ramchandra v Balaji[142] wherein it was laid down that

> "If on the death of a sole surviving coparcener A, his property has devolved upon his heir (B) by inheritance and on his (B's) death it has vested, in his own heir (C in this case son of B) the subsequent adoption in the family of the sole surviving coparcener (A) does not divest it from such heir".

In this case Chagla C.J. who delivered the judgment of the full bench of the Bombay High Court observed that in Anant v Shankar[140] what the Privy Council emphasised as the principle at p. 8 was:

> "In the present case the adopting widow was the mother of the last surviving coparcener. Her power to adopt could not have been exercised in his lifetime, and if exercised after his death, cannot, as their Lordships think, be given any

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141. Sankaralingam Pillai v Veluchami Pillai [1942] - 1 M.L.J. 119; A.I.R. 1942 Mad. 338; followed in Full bench case of Mad. H.C. in Sankaralingam v Veluchami I.L.R. [1943] Mad. 309, A.I.R. 1946 Nag. 203 at p. 206; (Udhao v Bhaskar); Prahlad Ramchandra v Gendalal Motilal, A.I.R. 1948 Nag. 351; Bhimaji v Hanumant Rao A.I.R. 1950 Bom. 271; Ramchandra Balaji v Apparao A.I.R. 1945 Bom. 220; Puttappa v Basappa A.I.R. 1953 Mys. 113; Lalithakumari v Rajah of Vizianagaram A.I.R. 1954 Mad. at p. 40; 67 Mad. L.W. 291.

142. A.I.R. 1955 Bom. 291 (F.B.): I.L.R. [1955] Bom. 837.

> less effect than would have attached to an adoption made after his death by the widow of a predeceased collateral".

Then their Lordships go on to say what the effect would be and that is the important part of the judgment:

> "It must vest the family property in the adopted son on the same principle, displacing any title based merely on inheritance from the last surviving coparcener".

The Supreme Court had occasion to consider Anant v Shankar[140] in the case of Shrinivas v Narayan[82] (above p. 272). wherein the Supreme Court had disagreed with that judgment with respect to one aspect of the decision and had pointed out that the claim of the appellant to divest a vested estate rested on a legal fiction, the legal fiction being that the adopted son was in existence at the date of the death of his adoptive father. It is this legal fiction which enables the adopted son to divest property which has already vested. In our opinion, observes Chagla, C.J., in Ramchandra v Balaji,[142] we should be very slow further to extend the scope of this legal fiction. It is very necessary that titles should be perfected and there should be no doubt as to the title enjoyed by a person owning property. The heir of a surviving coparcener or heir of an owner who leaves no family behind him may during his life-time hold property which is subject to defeasance. But as His Lordships observed there is no principle why this uncertainty as to title should be continued after his death when his heir was succeeded to him. Further there was another important principle of succession that inheritance should not remain in abeyance and that once the property had vested in the heir it should not be divested. 'The case of adoption', observed Chagla C.J. 'was a striking exception to this

principle. The principle is based on sound reason and we would be extending that exception if we were to give a wider application to the decision in Anant v Shankar.[140]

Applying the principles laid down in Quinn v Leathem[143] vis. (i) that every judgment must be read as applicable to the particular facts proved and (ii) that a case is only an authority for what it actually decides to the case of Anant v Shankar,[140] His Lordship observed that in his opinion that case was not intended to be an exposition of the whole law of adoption and that decision must be governed and qualified by the particular facts of the case. Similarly in view of the exceptional nature of that decision, in view of the fact that it created a legal fiction and constituted an exception to the Hindu law of inheritance, His Lordship looked upon that decision as only an authority for what it actually decided and did not accept any proposition that might seem to follow logically from it. His Lordship referred to Jivaji v Hanmant[144] and overruled Hanmantrao v Mahadevrao,[145] Krishnamurti v Dhruvaraj [in the High Court][146] and Yellappangowda v Krishtagowda.[147] The Andhra Pradesh High Court in the case of Pardhasaradhi Rao's[128] (as we have seen) followed the Bombay full bench decisions in Ramchandra v Balaji.[142]

The above decisions criticized

In his article entitled "Divesting by an adopted

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143. [1901] A.C. 495.

144. [1949] 52 Bom. L.R. 527 (F.B.).

145. [1952] F.A. No. 161 of 1949.

146. [1954] F.A. No. 236 of 1950.

son: A pressing problem for the Supreme Court"[148] Prof. Derrett rightly criticizes these decisions stating that they are contrary to what appears to be the intent of the Supreme Court in the case of Shrinivas v Narayan[82] (citing a passage from the judgment of Mr. Justice Venkatarama Iyer). He refers to various decisions where for example a sole surviving coparcener, who, instead of dying and leaving the family property to pass by inheritance had alienated parts or whole of it inter vivos[149] which could not be challenged by the subsequently adopted son. Even where the property had passed from the sole surviving coparcener by inheritance and had then passed from his heir on the latter's death, the Bombay High Court has held that it cannot be reached by the adopted son,[150] but here the Andhra Pradash High Court, observes Derrett, has very properly declined to observe whether the conclusion was fit to be followed. But the basis of the Andhra decision was that a distinction existed (though not pointed out in the Supreme Court) between property which passes from the sole surviving coparcener by inheritance on the one hand and property which he had alienated on the other.

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147. [1952] S.A. No. 395 of 1949.

148 [1960] S.C.J. (J) pp. 43 to 57.

149. See Question and Answer in K. Venkappa v Gopal Shivaji (1956) 59 Bom. L.R. 176 at 182-3.

150. Ramchandra v Bala Ji Dattu A.I.R. [1955] Bom. 291 (F.B.). The case was attacked in [1956] 58 Bom. L.R. (J.) 1 but has been followed in Ganeshrao v Ramchandra [1957] 59 Bom. L.R. 1032 and Jhankaribahu v Phoolchand A.I.R. [1958] M.P. 261. The case was attacked by Derrett in his article entitled Divesting: An Important full Bench decision on adoption [1956] 58 Bom. L.R. (J.) 1ff
See also P. Duraiswami Aiyangar, Adoption – Divesting of Estate (1956) 69 Law weekly 29-33.

Bombay and Andhra views - distinction made between alienation, legacy and Intestate Succession of sole surviving coparcener

Referring to Bombay decisions Derrett says[148] that Bombay had never permitted a sole surviving coparcener's alienations of any sort to be disturbed and then poses the question 'How can a distinction be made between alienation and legacy on the one hand and intestate succession on the other' and adds 'The property after all is joint family property and the absence of the adopted son is irrelevant in view of the doctrine of relation back'.[151] He further comments 'Logic demands the removal of the alleged distinction, but their Lordships in Andhra candidly say that logic is unsupported by authority'.

The sole surviving coparcener held subject to the rights of the females and others (such as illegitimate sons and concubines, if any) and they could, if they suspected danger to their interests, apply for a charge to be created over the property in their favour.[152] In the case of Umayal Achi v Lakshmi Achi,[153] Varadachariar J. said

> "... But, judged by the test of power of disposition two kinds of property held by a Hindu governed by that law viz., property obtained as his share at a partition and property held by him as a sole surviving coparcener, may, in some measure, resemble self-acquired property. There is however, this difference between them, viz., that in the case of self-acquired property, the owner's power of disposition will continue

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151. Ramchandra Shrinivas Kulkami v Ramkrishna Krishnarao Kulkarni [1952] 54 Bom. L.R. 636 cited below.

152. Ramchandra Gururao v Kamalabai [1944] Bom. 46 L.R. 358; Satwati v Kali Shankar [1955] 1 I.L.R. All. 523 at p. 526 following (F.B.) Dattatreya Putto v Tulsabai I.L.R. [1943] Bom. 646.

153. [1945] A.I.R. F.C. 25 at 31: [1945] F.C.R.I.: [1945] M.L.J. 108.

> to remain undiminished throughout his lifetime whilst in the case of the other two kinds of property his power of disposition will become qualified and his interest reduced the moment a son is born to him or the widow of a pre-deceased coparcener, takes a boy in adoption".

Ceylon view - Sole Surviving coparcener is a qualified owner

In Attorney-General of Ceylon v Arunachalam Chettiar,[154] a Privy Council case, Lord Simonds said, in answer to the question whether the property were "Joint property of a Hindu undivided family" within the Ceylon Statute[155]

> "The nature of the interest of a single surviving coparcener was the subject of exhaustive evidence by expert witnesses and their Lordships were referred to and studied numerous authorities in which in reference to his interest language was used not incompatible with his being regarded as the "owner" of the family property. But though it may be correct to speak of him as the "owner"; yet it is still correct to describe that which he owns as the joint family property. For his ownership is such that upon the adoption of a son it assumed a different quality: it is such, too, that female members of the family (whose numbers may increase) have a right to maintenance out of it and in some circumstances to a charge for maintenance upon it. And these incidents arise, notwithstanding his so-called ownership, just because the property has been and has not ceased to be joint family property";

and again

> "... The fatal flaw in the argument of the appellant appeared to be that, having labelled the surviving coparcener "owner", he then attributed to his ownership such a congeries of rights that the property could no longer be called "joint family property". The family a body fluctuating in numbers and comprised of male and female members,

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154. L.R. [1957] A.C. 513. For facts of the case see page 337-38

155. L.R. [1957] A.C. at 542; (1958) 60 Bom. L.R. (J) at 171 article by J.D.M. Derrett entitled "Estate duty and the nature of a Mitakshara coparcener's interest".

> may equally well be said to be owners of the property, but owners whose ownership is qualified by the powers of the coparceners. There is in fact nothing to be gained by the use of the word "owner" in this connection. It is only by analysing the nature of the rights of the members of the undivided family, both those in being and those yet to be born, that it can be determined whether the family property can properly be described as "joint property" of the undivided family".

The ownership of the sole surviving coparcener is therefore a very qualified affair, and he is certainly not a full, complete or absolute owner of the joint family property. The Madras High Court quote with approval the words of Wasoodew J., in Ayyangonda v Gadigeppagonda[156] to the effect that an adoptee might have a share in the property acquired by a sole surviving coparcener out of the proceeds of sale of the joint family property

> "I do not think the position of the sole surviving coparcener, who has invested the ancestral funds in a fresh business started by him, should be different (from the manager of a joint Hindu family's position) merely because he was the sole owner of the entire property at the time of the investment ..."

But their Lordships emphasise that the sole surviving coparcener is at perfect liberty to alienate joint property right up to the moment of the acquisition of the 'birth-right', because in that interval no coparcener exists having a right to complain.[157] The rights of maintainees to dispute alienations were not mentioned though they are well known.

Prof. Derrett remarks that the erroneous law which

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156. [1940] A.I.R. Bom. 200.

157. [1955] A.I.R. Mad. 705 at 713: [1956] 1 M.L.J. 152: I.L.R. [1956] Mad. 649 (Sivaramakrishnan v Kaveri Ammal).

had developed as a result of the pronouncements of the various High Courts was based on the defects of the twin sources of legal authority viz., the cases of Veeranna v Sayamma[131] and Krishnamurthy v Krishnamurthy.[138] In Veeranna's case[131] it was held that the last surviving member of a joint family was entitled to alienate all the family properties absolutely, even by gift as against a son adopted to his predeceased son

> "The last surviving male member of a Joint Hindu family is the full owner of all the family properties in spite of an unexercised power of adoption possessed by the widow of a deceased member ... The Theory that on an adoption, the adopted son's rights to property ordinarily relate back to the date of his adoptive father's death, does not apply to such a case".

As their Lordships of the Andhra High Court admit in Pardhasaradhi Rao v Shrinivasa[158] it is Krishnamurthi's case[138] which prevents the logical rule from being declared. For P. Chandra Reddy C.J., says

> "So far as I can see, there is no legal principle on which an absolute estate created by the husband's will in favour of his widow or anyone else can be divested by a subsequent adoption unless we can treat the adoption as so relating back to the life time of the husband as to destroy in respect of ancestral property his power of disposition by will, a view which the opinion expressed by the Privy Council in Krishnamurthi Ayyar's case[138] precludes us from taking".

Professor Derrett suggests that just as the Supreme Court in Shrinivas's case[82] cut off that part of Anant v Shankar[140] which was not based upon authority so it can in respect of Krishnamurthi's case[138] undo the harm which was done by a dictum expressly stated upon principle and without authority and having no connection with the subject matter of the appeal. There, their Lordships were concerned with the effect of an ante-

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158. A.I.R. 1959 Andh. Pradesh 512 (at p. 514).

adoption agreement entered into by the sole surviving coparcener who adopted to himself and the latter part of the dictum relating to testamentary dispositions had no connection with the subject matter of the appeal.[159] Referring to Veeranna's[131] case Prof. Derrett remarks[148] that while the sole surviving coparcener had many privileges, he was not the full owner and by his adoption the adopted son had a right to recall non-justifiable alienations made by the sole coparcener in the interval after his adoptive father's death otherwise the whole point of adoption would be lost. Knowing that the widow was about to adopt, the sole coparcener could give the property away to his sister for example and then say "what a pity!"

Veeramma v Sayamma[131] and what Prof. Derrett calls 'the wretched dictum' in Krishnamurthy's[138] case were followed in the other cases which the Bombay and Andhra judges felt obliged to rely upon and this accounts for the dictum of Justice Venkatarama Aiyar in Lalithakumari v Rajah of Vizianagaram[160] wherein he distinguishes inheritance from transfer inter vivos. Despite the weight of authority resting upon these two feeble foundations 'the true view of law' is not unpepresented. In Nagalutchmee v Gopoo[161] their Lordships of the Privy Council left the question of the testamentary capacity of the sole surviving coparcener open. In that case it was found as a fact that authority to adopt had not been given, but had it been given and had the adoption been made in pursuance of it, it seems clear that the will would have

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159. For the dictum of Lord Dunedin refer to p.308.

160. A.I.R. 1954 Mad. 19, 40.

161. [1856] 6 M.I.A. 309.

been held invalid. The headnote and dictum (at p. 345) refuse to lay down that a man who has no son at the time can transfer inter vivos. The Pundits whose replies (on p.350) were being considered, definitely stated the law as it always has been and the Privy Council in no way contradicted them. In or about the years 1846-48 it was generally understood by the Pundits and thus by the Company's Courts that a man might make a will disposing of the family estate only when he had no male issue and subject to adequate provision for all dependents of the family. The proposition that a coparcener cannot make a will of his coparcenary interest appeared later, but was another way of expressing part of the same proposition. In Gurupadappa's case Bavdekar J. evinced strong sympathy with the correct view, notwithstanding the dictum of Lord Dunedin and but for the fact that he felt the Privy Council dictum binding on him he would certainly have ignored it.[162] In Ramchandra v. Ramkrishna[151] their Lordships of the Bombay High Court observed:

> "It is held that every adoption made by a Hindu widow relates back to the death of the adoptive father; therefore, it can be no valid answer to the claim made by the adopted son that the coparcenary which he seeks to enter by reason of his adoption had already ceased to exist".

Thus where a coparcenary has ceased to exist, whether by the deaths of former coparceners or by a partition of the survivors from amongst them, the adopted son of a predeceased coparcener ought to be able to demand a partition of the family property and call the surviving holders of the property to account for

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162. Gurupadappa v. Karishidappa A.I.R. 1954 Bom. 318. In this case it was held that the adoption relates back to the date of the adoptive father's death and therefore the Plaintiff must be considered as existing at the time of the partition and thus entitled to be paid his one-fifth share of the family properties. Alienations not binding on those properties are therfore not binding on him, and his valid claim is free of them - they can however be debited to the shares of the actual alienors.

the ways in which they have alienated it.

In Babgonda v Anna[163] the Bombay High Court was inclined to be conservative and to see no reason to follow Krishnamurti's[125] case further than necessary. In that case the question which arose for consideration was whether the alienation by the sole surviving coparcener could be challenged by a subsequently adopted son to a predeceased coparcener in the family by the widow of the said coparcener. The Court upheld the proposition that "lawful" alienations of the joint family property made by the sole surviving coparcener could not be challenged by a coparcener who had come into the joint family either by birth or adoption subsequent to the date of alienation. In support of their decision they quoted from the decisions arrived at in a number of earlier cases, including Veeranna v Sayamma.[131] The same view has been taken by the Bombay High Court in Bhirnaji Krishnarao v Hanmantrao Vinayak[164] and Vithalbhai Gokalbhai v Shivabhai.[165] In the former case the sole surviving coparcener's right to make an alienation of portions of the family property and later challenged by the adopted son of a predeceased coparcener adopted subsequent to the date of alienation was upheld. In the latter case it was held that the adopted son was not entitled to question the dispositions made by the testator of the family property which were made prior to his adoption. The same view was also taken by the former Nagpur High Court in Udhao Samth v Bhaskar

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163. A.I.R. 1968 Bom. 8. For facts of the case see p. 507. Nandappa v SHIDGOUDA A.I.R. 1964 Mys. 217 disagreed with.

164. [1950] A.I.R. Bom. 271 = 52 Bom. L.R. 290.

165. 52 Bom. L.R. 301 = [1950] A.I.R. Bom. 289.

Jai krishna.[166] 'The view taken in these decisions', say their Lordships of the Bombay High Court, 'is not in any way affected by the Privy Council decision in Anant v Shankar[167] because in the said decision the Privy Council specifically referred to the decision in Veeranna v Sayamma[131] and approved of the view taken in that decision that the theory that on adoption the adopted son's rights to property ordinarily relate back to the date of his adoptive father's death does not apply to the alienations made by the sole surviving coparcener of the joint family property prior to the date of adoption". In Shrinivas v Narayan,[168] the Supreme Court narrowed down the application of the doctrine of relation back even in cases of inheritance, to the property of the adoptive father. Whilst observing about limitations their Lordships also pointed out that the theory of relation back is subject to the limitation that alienations made prior to the date of adoption are binding on him if they were for purposes binding on the estate. The Supreme Court was not considering a case of alienations made prior to the date of adoption by a male person who was competent to make such alienations. The right to challenge alienations on the ground that they are not justified either by legal necessity or for the benefit of the estate is available in cases where there is only a limited power to alienate e.g. a widow inheriting for a limited estate or the Karta of a joint family. There is no such limit where the alienating person is the sole surviving coparcener. Their

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166. [1946] A.I.R. Nag. 203.

167. [1943] A.I.R. P.C. 196.

168. [1954] A.I.R. S.C. 379.

Lordships in Bombay observed that it had always been held that the sole surviving coparcener could treat the property as his absolute property and the power to deal with it is not fettered by the contingency of an adoption being made by a widow in the family - just as alienations of joint family property made with the consent of all the existing coparceners are incapable of being challenged by coparceners coming into the family subsequent to the date of alienations or of a father's alienations, he being the sole surviving coparcener are incapable of being challenged by sons born subsequent to the alienations.[169] Thus if a son or other coparcener is not entitled to challenge alienations effected prior to his birth, a son brought into the family by an adoption made by a widow cannot be put in a more favourable position.

Commenting on the Supreme Court case Krishnamurthi v Dhurwaraj[170] their Lordships remarked that it was again a case of inheritance. It was held therein that the character of the property did not change from coparcenary property to self-acquired property so long as the widow of the family existed and was capable of adopting a son. It will be seen that in this case the application of the doctrine of relation back was capable of being made within the limits within which it could operate in view of the Supreme Court decision in Srinivas v Narayan.[168] The doctrine of relation back did not apply, their Lordships in Bombay opined, to challenging the lawful alienations which had taken place before the date of

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169. See Sivaramakrishnan I.L.R. [1956] Mad. 649; T. Mahalaxmiamma v M.S.R. Rao [1968] A.I.R. Mys. 229. Subject to the rule of overlapping of lives.

170. A.I.R 1962. S.C. 59 = (1962) 64 Bom. L.R. 165 S.C.

adoption. Their Lordships therefore thought that there was nothing in Krishnamurthi v Dhurwaraj[170] which could be taken to depart from the law as to the application of the doctrine of relation back to the cases of alienation.

Another case, i.e. that of Guramma v Mallappa[171] was cited by counsel for the appellant in support of their plea. In this case a father had alienated joint family properties which were later challenged by a son adopted long after his death and by his posthumous son. The latter who was in the mother's womb at the time of the alienation was a coparcener with the father at the date of alienation and was held entitled to challenge the said alienation. It was a case of overlapping. Their Lordships of the Bombay Bigh Court failed to see how this case could help the Plaintiff's case in any way.

In two decisions of the Mysore High Court viz. N. Parmanna v S. Ningappa[172] and Mahadevappa v Chanbasappa,[173] however, the adopted son's right to challenge alienations made by the sole surviving coparcener of the family prior to his adoption had been upheld before the Bombay case referred to above. The view taken by the learned judges in these decisions appears to be that the Supreme Court decisions in Shrinivas v Narayan,[168] Krishnamurthy v Dhruwaraj[170] are to the effect that the doctrine of relation back can extend even to cases of alienations and that unless the alienations are justified by legal necessity or benefit of the estate so as

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171. [1964] A.I.R. S.C. 510 = 66 Bom. L.R. 284.

172. [1964] A.I.R. Mys. 217.

173. [1966] A.I.R. Mys. 15.

to be binding on the family, the adopted son is entitled to challenge the said alienations. The Bombay High Court did not agree with the view taken by the learned judges of the Mysore High Court in these two cases for the reasons which we have already discussed. A similar view seems to have been taken by a single judge of the Bombay High Court in the second appeal No.907 of the companion second appeals decided on the 10th of April 1964 (Bom.) on reasoning similar to that of the Mysore High Court in the above mentioned two cases. In the opinion of their Lordships the Supreme Court decisions in the three cases cited do not affect the view takenby the Bombay High Court in Bhimaji v Hanmantrao [174] and Vithalbhai v Shivabhai.[175]

Their Lordships in Babgonda's case [163] observed that, where an alienation of the joint family property is made by a managing member with the consent of all the other coparceners in the family or by the sole surviving coparcener who has an absolute power to alienate the property, there being no other member whose consent he must take, such alienations whether or not they are for legal necessity or benefit of the estate are binding on the joint family. Where however an alienation is made by a managing member in the family without the consent of other coparceners, it can only be binding on the family if it is for legal necessity or benefit of the estate - otherwise such alienation can be challenged by the subsequently adopted son on his adoption.

In this conflict, I am inclined to agree with the

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174. A.I.R. 1950 Bom. 271.

175. A.I.R. 1950 Bom. 289. A similar view was taken by the Bombay High Court in Mahadeo v Rameshwar (1967) 70 Bom. L.R. 89. Also the Court while decreeing an adopted son's suit for possession of the share of the joint family property, held that it was entitled to make such equitable orders as Justice demands.

views of the Mysore High Court[172 & 173] and of Prof. Derrett[176] mentioned above. For as long as the widow of a coparcener is alive and capable of adopting, the future adopted son's rights should be safeguarded against arbitrary alienations by the sole surviving coparcener. The same appears to have been the views of the Supreme Court in Krishnamurthy v Dhruwaraj[170] et seq. and in other cases (see p. 295/) discussed above. Though Krishnamurthi's[170] case was a case of inheritance, the reasoning of their Lordships could well apply to cover cases of alienations made by sole surviving coparcers without legal necessity. As observed by their Lordships in Krishnamurthy v Dhruwaraj[170] a coparcenary continues to subsist as long as there is in existence a widow of a coparcener capable of bringing a son into existence by adoption and the rights of such adopted son are the same as if he had been in existence at the time when his adoptive father died. The estate continues to be the estate of the adoptive father in whosover's hands it may be i.e. whether in the hands of one who is the absolute or one who is a limited owner.

Legacies not divested

In Madras as well as in Bombay the High Courts had held that the sole surviving coparcener has the power to alienate by will and also inter vivos, in spite of the relation back of the adoption made afterwards by the predeceased coparcener's widow.[177] In D. Lakshminarasimhan v G. Rajeswari[177] the whole matter was thoroughly discussed

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176. At pages 312 et seq. above.

177. D. Lakshminarasimhan v G. Rajeswari A.I.R. 1955 Andh. p. 278.

and it was held that in a case where under the same instrument of will the testator confers upon his widow the power to adopt and at the same time makes certain dispositions, the adoption cannot operate to invalidate the bequest made under the will. The adopted son whose adoption is subsequent to the will coming into force, cannot question the dispositions made by the testator who under the same instrument has authorised his wife to adopt. The adoption has not the effect of invalidating the legacies given under the will (Krishnamurthi v Krishnamurthy[178] followed). The contention of the defendant was that since the will of Subrahmanyam (deceased adoptive father) could take effect only after the death of the last male-holder, and the adoption relates back to the death of the adoptive father, the adoptive father must be deemed to have had no testamentary capacity. But their Lordships did not think they could give effect to this contention. They observed that although it is true that in certain cases adoption has the effect of divestment, but the theory of relation back was not an absolute one applying in all respects. The position in this respect was summed up by their Lordships of the Privy Council in Krishnamurthy v Krishnamurthy[178] thus:

> "When a disposition is made inter vivos by one who has full power over property under which a portion of that property is carried away, it is clear that no rights of a son who is subsequently adopted can affect that portion which is disposed of. The same is true when the disposition is by will and the adoption is subsequently made by a widow who has been given the power to adopt. For the will speaks as at the death of the testator and the property is carried away before the adoption takes place (my emphasis. The correctness of this idea is open to doubt). It is also obvious that the consent or non-

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178. A.I.R. 1927 P.C. 139 (A).

> consent of the natural father cannot in such cases affect the question. But it is quite different when the adoption is antecedent to the date at which the disposition is meant to take effect. The rights which flow from the adoption are immediate and the disposition, if given effect to, is inconsistent with these rights and cannot of itself vi propria affect them".

Counsel for the defendants relied on the Madras decision in Erram Reddy v Maram Reddy,[179] which ruling their Lordships thought would not help the appellants. In that case, the testator after giving an absolute right to his wife in all his properties, added that if his wife desired at any time to adopt a boy, she could adopt any boy whom she liked. Construing this will, the learned judge decided that the bequest to the wife with absolute rights was by a necessary intendment only a provisional one. Option was given to her, according to the learned judges, under the will either to keep the property that was given to her absolutely or to make an adoption, in which event, she would be divesting herself of the estate that was vested in her under the terms of the will. The learned judges observed that the testator could not have contemplated that the widow should adopt a boy to perform the spiritual duties enjoined on him, and at the same time, he would not get anything. In such a situation, their Lordships said that the adoption had the effect of defeating the dispositions in favour of the adoptive mother. There is nothing in the judgment, observed their Lordships, to indicate that the learned judges were not prepared to accept the concept underlying the passage in Krishnamurthy v Krishnamurthy[178] is referred to and adopted by the learned judges.

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179. [1928] A.I.R. Mad. 271 (B).

In Narayan v. Padmanabh[180] the Bombay High Court held that where the last male holder in a joint Hindu family dies after making a will under which he gives a life estate to his wife and absolute estate to X and the wife adopts a son to her husband the adoption does not affect the interest of X under the will even if the testator might have expressed a desire that his wife should adopt after his death. Also the Madhya Pradesh High Court held[181] that the doctrine of 'relation back' laid down in Anant v. Shankar's case[140] should be restricted to the case of inheritance by coparcener and it has no application to the case of alienation made prior to the adoption. Hence, a disposition by will made by a sole surviving coparcener is not affected by the adoption of a son by the widow of a pre-deceased coparcener made subsequent to the death of the sole surviving coparcener, again, an illogical rule. In Ganeshrao v. Ramchandra[182] one G. Died leaving his widow S and daughter A, and certain property. G's son B predeceased him leaving his widow T. On G's death, S succeeded to the property. On the death of S, her daughter A succeeded and came in possession of the property. She, by her will, bequeathed those properties to defendants, who on her death succeeded to the properties. After the death of A, T, wife of B adopted the plaintiff, who claimed possession of the properties on the strength of his adoption. The Bombay High Court held, assuming that the property left behind by G was

180. I.L.R. [1950] Bom. 480: A.I.R. 1950 Bom. 319 (320-321). See article by J.D.M. Derrett: Some Troublesome Cases in Adoption 1953 55 Bom. L.R. (J). 1 wherein Derrett observes that the father was not entitled to dispose by will of property which never ceased to be potentially Joint family property until the death of the person entitled to adopt. It may be pointed out that such disposition of property would obviously be against the interests and welfare of the child adopted, who renounces his right in the natural family and confers temporal and spiritual benefits in the adoptive father's family and hence should not be permitted.

181. Jhunkaribahu v. Phoolchand A.I.R. 1958 Madh. Pra. 261 (266).

182. A.I.R. 1958 Bom. 141 (142, 143).

the coparcenary property of G and his predeceased son B, the adoptive father of the Plaintiff, that the last surviving coparcener or male holder was G and after the death of the limited owner, viz., his widow S, the property left behind by G had vested in his daughter A. The family being governed by Bombay School of Law, A had become an absolute owner of the property subject to defeasance in the event of potential mother T adopting a son into the family of G. On A's death the property vested in the defendants under her will. This had happened prior to the date of adoption. The Plaintiff therefore was not entitled to divest the property which had vested not in the heirs of G but in the heirs of A.

The Madhya Pradash High Court has held that the operation of the will made by the sole surviving coparcener is not affected by the subsequent adoption by his widow.[183]

Recently in Ramachandra v Anasuyabai[184] the Mysore High Court has held that one's right to deal with one's family properties as the sole male member is absolute and unimpaired and cannot be curtailed by the possibility of a son being adopted to him by his widow, which may or may not happen.

Where his widow adopts a son to him after his death, the adopted son cannot claim back properties disposed of by his deceased father before his death. The doctrine of "relation back" only establishes a line of succession and the dispositions made by the father cannot be disturbed by an adoptee who was never in existence as such when the dispositions

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183. I.L.R. [1961] Madh. Pra. 188. (Mohanlal v The Commissioner of Income Tax)

184. A.I.R. 1969 Mys. 64.

were made. What an adopted son is entitled to claim is only the properties of his adoptive father or the interest of his adoptive father in the properties as on the date of his death.[185] Further, it is competent for a sole surviving coparcener to dispose of properties by will, and the subsequently adopted son by his widow has to take the estate subject to the dispositions made by the will. But, in case the adoption is made before the dispositions take effect i.e. before the death of the testator, then the adopted son's right comes into existence immediately on his adoption, and, he being in existence, the dispositions made by will cannot take effect and the rights of the adopted son cannot be defeated because such vesting is inconsistent with the right of an adopted son who is entitled to claim the properties of his adoptive father.[186]

I agree with the decisions of the various courts mentioned above in the cases where legacies made by the (deceased) adoptive father have been upheld as against the son adopted by the widow after the will had come into effect. A distinction exists between legacies (which are in effect alienations made by the father) and alienations of coparcenary property made by a sole surviving coparcener who is not the father. Even according to Manu and the Dayabhaga school the father is the absolute owner of property and considering the Mitakshara father's rights in this light it would seem justified that he should have the right to dispose of his

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185. Veeranna v Sayamma A.I.R. 1929 Mad. 296 and Anant v Shankar A.I.R. 1943 P.C. 196 (para. 36) relied on.

186. Krishnamurthy v Krishnamurthy A.I.R. 1927 P.C. 139 and Erram Reddy v Maram Reddy A.I.R. 1928 Mad. 271, followed.

property by will as there exists no 'son' having a right to complain. But in case of arbitrary alienations of a sole surviving coparcener who is not the father, as already pointed out by me on pages 324-325 and 464-5 above, the rights of the future adopted son adopted by a deceased coparcener's widow must be safeguarded and all such alienations made without legal necessity must be capable of being set aside when the adoption is actually made by such widow.

Adoptions after death of last surviving coparcener

A full bench of the Mysore High Court held that where, after the death of the last surviving coparcener in a joint Hindu family, the family property passes by inheritance to his heir and subsequently the widow of a predeceased coparcener makes an adoption in pursuance of an authority to adopt given to her by her husband the adoption dates back to the death of the adoptive father and will have the effect of divesting the estate vested in the heir of the last surviving coparcener, or in persons claiming through such heir, and vesting the property in the adopted son subject to lawful alienations made in the meantime by the person who was entitled to hold the estate until the adoption.[187] Also, following the Privy Council cases of Anant v Shankar, Neelangouda v Ujjangouda and Srinivas v Narayan (Supreme Court),[188] the Nagpur High Court held in Tukaram v Gangi that where an adoption is made by a widow of a deceased coparcener even after the death of

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187. Chikkavva v Chikkappa (1959) 54 Mys. H.C.R. 12; 28 Mys. L.J. 271 (F.B.).

188. A.I.R. 1943 P.C. 196; A.I.R. 1948 P.C. 165 and A.I.R. 1954 S.C. 379 respectively.

the last male coparcener the rights of the adopted son would be the same as if he had been in existence at the time when his adoptive father died and his title as coparcener would prevail as against the title of any person claiming as heir of the last coparcener.[189] The Andhra Pradesh High Court has also upheld this contention in Purnananda v Purnanandam.[190]

View that property vesting in collateral not divested on adoption

In Ganpati v Anandrao[191] the Bombay High Court observed that it was clear principle that where the property had vested in a collateral on the death of the last male holder and an adoption was made thereafter then in such a case the adoption had not the effect of divesting the property already vested in the collateral or an heir of the collateral. A full bench of the same High Court had held that an adoption after the death of a collateral will not allow the adopted son to come in as an heir of the collateral.[192] The Mysore High Court has also held that where the sole surviving coparcener dies without leaving wife or children his mother inherits the estate as his heir and the property becomes her stridhan property and a subsequent adoption made by her to her husband cannot divest her.[193]

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189. I.L.R. [1956] Nag. 712: A.I.R. 1957 Nag. 28 (29, 30).

190. Purnananda v Purnanandam A.I.R. 1961 Andh. Pra. 435 (444).

191. A.I.R. 1954 Bom. 384 (385). As shown in the subsequent discussion (pp. 333 et seq.) this view appears to be erroneous.

192. Tirvaji Annaji v Hanmant Ramchandra I.L.R. [1950] Bom. 510: A.I.R. 1950 Bom. 360 (360, 362) (F.B.).

193. See (Mysore) Hindu Law Women's Rights Act (10 of 1933) Ss 9(2)(a), 10(g). A.I.R. 1950 Mys. 77 (D.B.) Local Acts. (Sannamma v Earappa).

Relation back to adoptive father's estate whether in hands of absolute or limited owner

The Supreme Court has now decided in the case of Krishnamurthy v. Dhruwaraj[193a] that so long as the widow in the family existed and was capable of adopting a son who becomes a coparcener, the fact that a person inherited the property of his father absolutely did not change the character of the property to self-acquired property of such person. (a) An adopted son has been held entitled to take, in defeasance of the rights acquired prior to his adoption on the ground that in the eye of the law his adoption relates back, by a legal fiction, to the date of the death of his adoptive father, he being put in the position of a posthumous son. (b) A coparcenary continues to subsist as long as there is in existence a widow of a coparcener capable of bringing a son into existence by adoption and the rights of such adopted son are the same as if he had been in existence at the time when his adoptive father died and that his title as coparcener prevails as against the title of any person claiming as heir to the last coparcener. (c) The principle of relation back applies only when the claim made by the adopted son relates to the estate of his adoptive father. The estate may be definite and ascertained, as when he is the sole and absolute owner of the properties or it may be fluctuating as when he is a member of a joint Hindu family. The principle of relation back cannot be applied when the claim is made to the estate of a collateral (where the governing principle is that inheritance can never be in abeyance, and not of relation back). (d) The estate continues to be the estate of the adoptive father in whosoever's hands it may

193a. A.I.R. 1962 S.C. 59. See also article by S.R. Kulkarni: The Doctrine of Relation back in Adoption and its Validity. [1963] 65 Bom. L.R. (J) 4 wherein the doctrine of relation back (with special reference to Krishnamurthi's case) has been criticized on the ground of absence of textual authority on the point. Although as pointed out by me at p.281, the Smritis are silent on the relation back theory, it could be justified on equitable grounds and also from the point of view of welfare of the child adopted. See p.281-2

be i.e. whether in the hands of one who is the absolute or one who is a limited owner. Anyone who inherits the estate of the adoptive father is his heir, irrespective of the inheritance having passed through a number of persons, each being the heir of the previous owner.

The Supreme Court considered, among other cases, the case of Ramchandra Hanmant v Balaji Dattu, [142] (above p.310).

Their Lordships of the Supreme Court did not agree with the view of the Bombay High Court in this case and said that the conclusion went against what has been said by that Court in Shrinivas Krishnarao Kango's case.[194] They further added

> "It has been overlooked that the heir of a collateral succeeding to the sole surviving coparcener inherits the property absolutely, but still subject to defeasance, as no better title could have been inherited so long as there was the possibility of the defeasance of the absolute title by a widow of the family of the last surviving coparcener adding a member to the coparcenary by adopting a son to her deceased husband and in overlooking what was stated in this connection by this Court in Shrinivas v Narayan's case [194] though not as a decision but as a reasoning to come to a decision in that case".

The view expressed by the Supreme Court in Krishnamurthi v Dhruwaraj[170] seems to me to be the correct one, for, as long as the widow of a coparaener is alive who is capable of continuing the family line by adoption of a son, any intermediate heir who inherits the property takes its subject to defeasance on adoption being made by the widow.[194a] The view expressed by Chagla C.J. in Ramchandra v Balaji [142] therefore seems to have been erroneous. So also the view of Mallappa J.

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194. /1954/ A.I.R. S.C. 379 = /1955/ 1 S.C.R. 1.

194a. Krishnamurthi's case is commented upon in the cases of Babgonda; N. Parmanna and Mahadeo v Rameshwar discussed above at pages 320 to 325.

in Venkatiah v.Kalyanamma[195] that the adoptive son's right to what can be said to be his adoptive father's properties arises, not on the date of his death but on the date of adoption is inequitable to the adopted son who loses all his rights in his natural family.

In S. Pedda Subbayya v. S. Ademma[196] the Andhra Pradesh High Court held that the rights of an adopted son accrue on the date of his adoption and he is entitled to challenge the alienation made by a limited owner prior to the adoption. If the widow of the last male holder is in possession on the date of the adoption by the widow of a predeceased coparcener, the adopted son of the family has a right to divest the widow in possession. And if he does not do so, the widow will be deemed to be in adverse possession, she being entitled to maintenance out of the estate only, unless it can be shown that there was an arrangement between her and the adopted son to leave that property in her possession. Their Lordships referred to the special bench decision of the Madras High Court in Vedathanni v. The Commissioner of Income Tax, Madras,[197] though no doubt an income tax case, nevertheless held that there can be a joint family with a single male member, provided there are widows of deceased coparceners or other persons entitled to maintenance. Also in Krishnamurthy v. Dhruwaraj,[170] their Lordships, after referring to the cases of Anant v. Shankar[58] and Amarendra Mansingh[30] observed at p. 62 thus

195. A.I.R. 1953 Mys. 92. See also Derrett, J.D.M.: An Important Development in the Law of Adoption (1955) 57 Bom. L.R. Journal 73 ff. at 83-4.

196. (1967) 2 An. W.R. 314.

197. (1932) 63 N.L.J. 542; I.L.R. (1933)) 56 Mad. 1.

> "It follows from these observations that if A is an owner of property possessing a title defeasible on adoption, not only that title but also the title of all persons claiming under him, will extinguish on the adoption".

So also the Supreme Court has recently recalled (it was obiter) in Mudigowda v Ramchandra[198] that an adoption validly made by the widow of a deceased coparcener has the effect of divesting the estate in the hands of the last surviving coparcener and puts an end to partition and enables the adopted son to claim a share in the family properties as if they were still joint. In a very recent case Sitabai v Ramchandra[199] one of the questions to be considered in the appeal before the Supreme Court was whether an adopted son at the time of his adoption by the widow of a deceased coparcener became a coparcener with the last surviving coparcener (his adoptive uncle) in the joint family properties. We may for the present take notice of this case without reference to Sec. 12 of the Hindu Adoptions and Maintenance Act. At the time when the son was adopted the joint family still continued to exist and the disputed properties retained their character of coparcenary properties. Their Lordships referred to the Supreme Court decision in Gowli Buddanna v Commissioner of Income-tax, Mysore[200] that under the Hindu system of law a joint family may consist of a single male member and widows of deceased male members and that the property of a joint family did not cease to belong to a joint family merely because the family is represented by a single coparcener who

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198. (1969) 2 S.C.J. 668.

199. A.I.R. 1970 S.C. 343.

200. A.I.R. 1966 S.C. 1523.

possesses rights which an absolute owner of property may possess. Their Lordships also referred to the observation by the Judicial Committee in Attorney General of Ceylon v A.R. Arunachalam Chettiar[201] that it is only by analysing the nature of the rights of the members of the undivided family, both those in being and those yet to be born, that it can be determined whether the family property can properly be described as 'joint property' of the undivided family.

In that case one Arunachalam Chettiar and his son had constituted a joint family governed by the Mitakshara school of Hindu law. The father and son were domiciled in India and had trading and other interests in India, Ceylon and Far Eastern Countries. The undivided son died in 1934 and Arunachalam senior became the sole surviving coparcener in the Hindu undivided family to which a number of female members belonged. Arunachalam died in 1938, shortly after the Estate Ordinance No. 1 of 1938 came into operation in Ceylon. By S. 73 of the Ordinance it was provided that property passing on the death of a member of the Hindu undivided family was exempt from payment of estate duty. On a claim to estate duty in respect of Arunachalam senior's estate in Ceylon, the Judicial Committee held that Arunachalam was at his death a member of the Hindu undivided family, the same undivided family of which his son, when alive, was a member and of which the continuity was preserved after Arunachalam's death by adoption made by the widows of the family and since the undivided family continued to persist, the property in the hands of Arunachalam as a single coparcener was the

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201. L.R. [1957] A.C. 540. See also P. 315.

property of the Hindu undivided family. The basis of the decision was that the property which was the joint family property of the Hindu undivided family did not cease to be so because of the "temporary reduction of the coparcenary unit to a single undividual". The character of the property, viz., that it was the joint property of a Hindu undivided family, remained the same. Applying the principle to the present case, after the death of the adoptive father B the joint family property continued to retain its character in the hands of D (the elder brother of B) as the widow of B was still alive and continued to enjoy the right of maintenance out of the joint family properties.

Coparcenary determined by partition is revived by adoption

In Ramchandra v Ramkrishna[202] the possibility that a legatee may be divested by the adopted son, where the testator was a sole surviving coparcener has been asserted by the Bombay High Court. In this case one S and his two sons R and K formed a joint Hindu family. K died in 1930 leaving a widow but no issue. In 1932 K's widow adopted the Plaintiff to her deceased husband and on the day of the adoption S and R entered into a partition deed partitioning the coparcenary between them. Thereafter S alienated the property which had fallen to his share by executing deeds of gift in favour of R's children. After the death of S in 1934 the Plaintiff filed a suit claiming a half share in the coparcenary property as adopted son of K. It was held that the coparcenary which had been determined by the partition between S and R was in

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202. (1952) 54 Bom. L.R. 636.

effect revived by the adoption of the Plaintiff and that the Plaintiff's claim made in the suit should be treated as a claim for reopening a partition which had been made without recognizing his share in the family properties that it was not open to S to alienate any of the family properties so as to bind the Plaintiff unless such alienations were justified by the provisions of Hindu law, and that, therefore the Plaintiff was entitled to claim a half share in the properties in suit.

> "In dealing with this question it is necessary to remember that in the branch of Hindu law dealing with adoptions and their effect, legal fictions abound and their sway is supreme. Some of these fictions are based upon a very liberal interpretation of the texts, while some others claim authority on grounds of equity, justice and good conscience. But these fictions, have, for some time past been so consistently and so emphatically laid down by their Lordships of the Privy Council that it is not now open to inquire whether they should be given full effect. Besides, we apprehend that such an inquiry may even be inexpedient. Their Lordships of the Privy Council have considered the relevant provisions of the Hindu law of adoption and have clearly stated what, according to them, is the effect of the spirit and the letter of these provisions. In dealing with the present question, therefore, it is necessary to find out the effect of the legal fictions which have been and must now be judicially recognised. If these legal fictions give rise to anomalies in the administration of this branch of Hindu law, the only remedy is for the legislature to step in and codify the law".

In this case the High Court on appeal had reversed the Lower Court's decision and held that partition took place before the adoption and on the date of the adoption there was no coparcenary in existence. The Privy Council on appeal held that the Plaintiff was entitled to the share of his adoptive father and that the property in suit in which he claimed his share must be deemed to be coparcenary property. In remitting

the appeal to the High Court to determine what share in the suit property the Plaintiff was entitled, Sir John Beaumont, who delivered the judgment of the Board on November 14, 1949, observed as follows.

> "... Since the decision of the High Court it has been held by this Board in the case of Anant Bhikappa Patil v Shankar Ramchandra[58] Patil, that the view taken of the law in Balu Sakharam's case[60] was erroneous, and on the basis of the Board's decision, it is clear that the appellant on his adoption became entitled to share in the coparcenary property notwithstanding that the coparcenary had come to an end before the date of his adoption".

It was therefore held that under the Hindu law the rights of an adopted son are not affected by reason of the fact that the joint status of the family which he seeks to enter by his adoption had been terminated either by a prior partition between the surviving coparceners or by the death of the sole surviving coparcener. In either case the adopted son is entitled to enter his adoptive family on the basis that the family is a joint and undivided Hindu family and his rights in the property of the family must be decided on that basis.

Under the Hindu law partition is made only once, but there are some exceptions to this rule. The posthumous son can daim a re-partition and so can the heir of a disqualified person and an absent coparcener. The case of the adopted son must be included amongst these exceptions because the position of an adopted son is analogous to that of a son who was in his mother's womb, at the time of partition, but who is born thereafter. Posing the question as to the view the Supreme Court would possibly take if the question came up for decision before it, Prof. Derrett in his above mentioned

article observes[148]

> 'For it is inconceivable that the Supreme Court should hold that the sole surviving coparcener was a full and complete owner of the joint family estate for the purpose of disenabling a future adoptee to claim a share in whatever he may have happened to transfer inter vivos, whilst at the same time holding that the property in the hands of a sole surviving coparcener is "joint family property"';

and again

> 'Nothing can be clearer than that the sole surviving coparcener is not the full and complete owner of the property; his fruitless attempt to dispose of it to the prejudce of maintenance rights of female dependants of predeceased coparceners shows that clearly enough,[203] and the freedom that the temporary absence of a coparcener gives him is apt to prove illusory'.

Yet we have noted a dispute between the High Courts.

The 'relation back' theory after the Hindu Adoptions and Maintenance Act 1956

The Hindu Adoptions and Maintenance Act 1956 is silent on many vital points. For example, on the question whether a son adopted by a widow will be deemed to be the son of her deceased husband or not, or conversely on the relationship of an adopted son of a widower with the deceased wife of the adoptive father. Section 12 of the Hindu Adoptions and Maintenance Act 1956 provides that an adopted child shall be deemed to be the child of the adoptive father or the adoptive mother for all purposes. It lays down:

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203. Manilal v Bai Tara (1893) I.L.R. 17 Bom. 398; Somasundaram Chetty v Unnamalai Ammal (1920) I.L.R. 43 Mad. 800; 39 M.L.J. 179; Ram Kunwar v Amar Nath (1932) I.L.R. 54 All. 472; Malkarjun v Sarubai [1943] A.I.R. Bom. 187. The right is postponed to joint family debts but not it seems, the personal debts of the sole surviving coparceners.

An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adopted family.

Provided that -

(a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;

(b) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligation, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;

(c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption.

Section 14 provides:

1. The living wife or the seniormost wife in case where more than one wives are living of the adopter shall be deemed to be the mother of the adopted child. The other living wives shall be deemed to be the step-mothers.

2. A wife married by the adopter subsequent to the adoption shall be deemed to be the step-mother to the adopted child.

3. A husband married by the adopter (the adopter being a widow or spinster) subsequent to the adoption will be deemed to be the step-father to the adopted child.

Thus in spite of having had the occasion and necessity to describe the fictional relationship of both mother and step-mother, the Act is silent about the relationship

of the adopted child with the deceased spouse of the adopter.

In his article entitled 'Desirability of Amendments in present law of Hindu Adoption',[204] Mr. Narayan Das opines that this omission must be presumed to show that the legislature never intended to create any relationship whatsoever between the adopted child and the deceased wife of the adoptive father or with the deceased husband of the adoptive mother, and quotes the old maxim "expressio unius est exclusio alterius" in support of his above deduction. He further says that

> 'at least such a deceased spouse of the adopter cannot be deemed to be the father or mother of the adopted child, even if by any stretch of imagination he or she can be deemed to be the step-father or step-mother'.

He also refers to a decision of the Board of Revenue reported in Roshan Lal v Pooran Lal,[205] and according to him this decision is incorrect. The Board in the aforesaid case had held as follows:

> "If a child is adopted by a widow after the death of her husband the child becomes the son of both even though the husband was not alive at the time of adoption and at the death of the widow he would succeed under S. 171 U.P. Zamindan Abolition and Land Reforms Act as the heir of the husband.'

Although according to this writer this decision is incorrect but then he has suggested the following amendments to Section 14 to be added after 14(4) as 14(5) and 14(6):

> "14(5) where a widow, who has been expressly prohibited by her husband by a writing signed by him, from adopting a son, adopts a son, the deceased husband of the widow shall be deemed to be the step-father of the adoptive child.

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204. A.I.R. 1965 Journal 27.

205. [1964] All L.J. (Rev.) 54.

> 14 (6) In any other case of adoption of a son by a widow, not covered by sub-section (5), it shall be presumed that such an adoption is made to the deceased husband. The adopter shall be deemed to be the mother and her deceased husband the father of the adopted child".

Adoptions made before Adoption Act 1956 -- Can adoptee divest property in the widow?

Coming now to the cases decided on the subject, a convenient place to start is Ramalingam v. Punithavalli Ammal.[206] In this case, a Hindu governed by Mitskshara law called Somasundaram died in 1937 leaving a widow and two daughters. The estate was inherited by the widow, who was possessed of it in 1956 when the Hindu Succession Act came into force; under Section 14(i) of this Act she became absolute owner. On July 13,1956, i.e., before the Hindu Adoptions and Maintenance Act came into force, she adopted Ramalingham. On June 19, 1957 she made a settlement of her late husband's property or substantial part of it, on one of the daughters. It was held by the Madras High Court that notwithstanding the full or absolute estate, the relation back of the adoption of the adopted son to 1937 when the father died could not be prevented from taking effect. The doctrine established in Krishnamurthi v. Dhrowaraj[207] that adoptions at Anglo-Hindu law enable the adopted son to divest property belonging to his father, no matter into whose hands it might have passed in the interval between the father's death and the adoption, had not been abolished by anything in this Hindu Succession Act. The result was that the adopted

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206. [1964] 2 M.L.J. 571.

207. [1961] 64 Bom. 165, S.C., [1961] 11 S.C.J. 582. See also regarding alienations N. Paramanna v. Ningapra [1964] A.I.R. Mys. 217.

son was owner of his adopted father's estate since his adoption worked a defeasance. The adopting mother had no title from the moment of the adoption and could not make the impregned settlement. It was argued that by Section 14(1) she was absolute owner and could not be deprived of the property. But S. Ramachandra Iyer C.J. and Anantanarayana J. convincingly showed that the absolute estate could be subject to defeasance on the analogy of that of the widow-heiress under the old system who would certainly be divested if a son who had been missing for more than 7 years turned up and claimed his deceased father's estate.

The Supreme Court has, however, recently reversed the decision of the Madras High Court in Punithavalli v. Ramalingam[207a] wherein their Lordships of the Supreme Court held that the full ownership conferred on a Hindu female under S.14(1) of the Hindu Succession Act (1956) is not defeasible by the adoption made by her to her deceased husband after the Act came into force. Their Lordships of the Supreme Court observed that the section plainly says that the property possessed by a Hindu female on the date the Act came into force whether acquired before or after the commencement of the Act shall be held by her as full owner thereof. That provision makes a clear departure from the Hindu Law texts or rules and those texts or rules cannot be used for circumventing the plain intendment of the provision. Also the Supreme Court held in Munna Lal v. Rajkumar[207b] that by virtue of Section 4 of the Hindu Succession Act (1956) the legislature abrogated the rules of Hindu Law on all matters in respect of which there is an

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207a. A.I.R. 1970 S.C. 1730.

207b. A.I.R. 1962 S.C. 1493.

express provision in the Act. Their Lordships in Punithavalli's [207a] case approved the decision of the Bombay High Court in Yamunabai v. Ram Maharaj,[208] (which case is discussed below).

A similar view has been taken by the Andhra Pradesh High Court recently in the case of Kavuluru v. K. Purushothamma[207c] In this case the father of the appellant executed a will in favour of his wife, the step-mother of the appellant, prior to the coming into force of the Hindu Adoption and Maintenance Act, 1956. Under the will he gave power of adoption to his wife, and to adopt a son of his daughter, the appellant in the case. The testator died in 1947. His widow made the adoption contrary to the directions given by her husband in his will after the Act came into force. The widow died in 1963. The appellant filed a suit contending that the adoption was invalid and she was entitled to her father's properties as per the terms of the will. The third defendant, the adopted son resisted the suit contending inter alia, that after the Hindu Adoptions and Maintenance Act came into force, his adoption was governed by the provisions of the Act though it was contrary to the direction given in the will. The trial Court upheld the contentions of the defendant and dismissed the suit. On appeal by the plaintiff the High Court held that on a reading of Sections 4 and 5 and the other sections (6 and 9 to 12) of the H.A.M.A 1956, the validity of an adoption which had taken place after the commencement of the Act had to be tested with reference to the provisions of the Act and not with reference to any conditions laid down by the adoptive father either in a will or other instrument. If on the other hand, an adoption

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207c. [1971] 1 An. W.R. 134.

208. [1960] A.I.R. Bom. 463.

takes place before the commencement of the Act, its validity has to be judged with reference to the state of the Hindu Law prevailing before the Act. The directions given in the will (regarding the boy to be adopted) cannot be relied upon for the purpose of invalidating an adoption which was otherwise valid under the Hindu Adoption and Maintenance Act, 1956.

Their Lordships also observed that the terms of the will showed that the widow was allowed to enjoy the properties as 'limited owner'. However, on the commencement of the Hindu Succession Act (x x x of 1956) an event not in the contemplation of the testator, her limited estate became enlarged into an absolute estate under Section 14 of this Act, with the result that the son adopted later could not divest that absolute estate. He can succeed to the property only as her heir.

It would appear that the decisions of the Supreme Court in Punithavalli's case[207a] and of the Andhra High Court in Kavuluru's case[207c] in respect of the husband's properties vesting absolutely in the widow between the intervals of the passing of the Hindu Succession Act 1956 and the Hindu Adoptions and Maintenance Act, 1956 appear to be correct in view of Section 4 of the Hindu Succession Act, 1956, mentioned above. But as discussed subsequently the various provisions of the Hindu Adoptions and Maintenance Act, 1956 have restored the theory of 'relation back' and properties vesting in the widow after the passing of the Hindu Adoption and Maintenance Act, 1956 could be divested by the son adopted by the widow as such a son

is deemed to be the son of the deceased husband of the widow from the moment of his death.[214 and 229]

View in Bombay

The judgment of the Madras High Court in Ramalingam's case[206] conflicts in important respects with that in the Bombay case of Yamunabai v. Ram Maharaj[208] wherein an opposite conclusion was reached. In this case an adopted son was held not entitled to divest an estate which was in the hands of co-widows pending the regularisation of his adoption, during which period the Hindu Succession Act had come into force so that their title ripened into an absolute estate. The Bombay High Court held that Section 14 of that Act debarred the adopted son from any claim based upon relation back such as would disturb the widow's full ownership. Commenting on these cases, Prof. Derrett in his article "Adoption, Succession and the present state of Hindu Law"[209] opines that plainly the Madras case was morefully argued and more acutely reasoned out. But then both these cases were concernerned with adoptions

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209. Bom. L.R. (J) April 1966. p. 41

made before the Hindu Adoptions and Maintenance Act 1956 came into force. What of adoptions made thereafter?

In Ankush Narayan v Janabai Rama[210] it was held that as a result of an adoption by either spouse, the adopted son becomes the child of both the spouses and that this result necessarily followed from the combined operation of the customary Hindu law and the provisions of the Hindu Adoptions and Maintenance Act 1956. The case deserves a special study since the Supreme Court has explicitly approved of it. In this case, one Narayan died intestate in 1917. His immediate heirs were his two widows. The senior was Laxmibai who died intestate in 1948. The junior widow was Tanubai, who in Dec. 1957 adopted Ankush aged 9. The deceased Narayan had also left a daughter, Janabai, daughter of Laxmibai. In 1957 the estate, after the death of Laxmibai, was in the hands of Tanubai, and Tanubai claimed that she alone was entitled to the property. On Dec. 31, 1957, Ankush sued his adoptive mother and her step-daugher (who had made common cause) for possession of the estate. It was claimed on behalf of the ladies that when an adoption is made under the new system by a widow she does not divest herself, but merely obtains a son, who has no relationship whatsoever with his adopting mother's deceased husband's family. Their Lordships took the view that the most important part was the last phrase of Section 12 of

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210. [1965] 67 Bom. L.R. 864 commented upon by Haridas Gujarathi at [1966] A.I.R. Journ. 19-20 where numerous difficulties are adverted to and are likely to arise out of a literal adherence to principles suggested here and also by Derrett at [1966] 68 B.L.R.J. p. 44. The estate of the adopted father (Narayan) who died in 1917, had surely vested absolutely in the surviving widow prior to the adoption.

the Hindu Adoptions and Maintenance Act 1956 (i.e. before the proviso's commenced) which states

> "... with effect from the date of adoption ... all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family".

Their Lordships opined that the necessary consequences of the Act's provisions in Subsection (VI) of Section 11 and Section 12 of the Act were that the widow's adoption provided an heir for her deceased husband. This must be so if the adopted child were to have the same relations in his new family as he would have had in his old, and the range of relations could not be restricted to those which he actually had. He must stand as a new member in the family exactly as if he had been born in it. In their view when either of two spouses adopts, both get a child and this would be true for all purposes. He is related to collaterals; he becomes (p. 868) a coparcener. At p. 866 the effect of proviso (C) of Section 12 is considered. It was not thought to have any limiting effect on the general proposition in the main body of the section. As a result Ankush was held entitled to divest his adopting mother, notwithstanding her being an absolute owner. 'This would have been true', remarks Prof. Derrett, 'as we have seen under the Madras ruling, had the adoption taken place a year earlier. But could it be true after the coming into force of both statutes?'.[209] Mr. Haridas Gujarathi in his article "Adoption by a Hindu widow after 21st December 1956"[211] observes that the question to be decided in Ankush v Janabai's[210] case was

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211. A.I.R. 1966 Journal 19.

> "If a Hindu adopts a child after the coming into force of the Hindu Adoptions and Maintenance Act 1956 i.e. after 21 Dec. 1956 whether the adopted child also becomes the adopted child of her deceased husband".

Their Lordships answered the question in the affirmative but according to Haridas Gujarathi the question was not free from doubt. Mr. Gujarathi further observes that the words "by" or "to" in Section 5 are very important and may have two meanings (a) 'to' may refer to physical act of giving and taking a child in adoption under Section 11(vii) i.e. the child to be adopted must be actually given and taken by the parents or guardians concerned or under their authority to transfer the child from the family of its birth to the family of its adoption. This view is preferred by Mr. Gujarathi. (b) Secondly the word 'to' may refer where one person also adopts to himself and another - as in the present case. Section 12 of the Act provides that the adopted child shall be deemed to be the child of the adoptive father 'or' mother for all purposes. Mr. Gujarathi observes that the word 'or' is important in that it does not speak of the relationship of the child with the spouse of the adopter. There is no other provision in the Act which, says Mr. Gujarathi, may possibly throw light on this aspect. In the statement of objects and Reasons published in The Gazette of India Extraordinary (Pt. II, Sec. 2 dated 23 Aug. 1956 at p. 739, para. 2 at p. 749) stated ... There is no longer any justification for allowing a husband to prevent his wife from taking a child in adoption after his death. The adoption made by a Hindu widow will hereafter be in her own right. The equality of an adopted child to the natural child is a fiction of law.

To treat such child as a child of the deceased husband (as in the present case), opines Mr. Gujarathi, would be to superimpose a fiction upon a fiction.

The crucial question in cases of adoption is not mere relationship with one person or the other, it is that of the right to properties in cases of intestate succession. The Hindu Adoption law of British times entirely revolved round this question, observes Mr. Gujarathi and quotes P.V. Kane as follows[212]

> "There is so much bewildering confusion and so much case law on the several aspects of adoption that it is only legislation that can resolve the tangled shein of the modern law of adoption".

According to Mr. Gujarathi, Sec. 12(c) of the Act has attempted to 'resolve the tangled skein' and adds that it remains to be seen whether their Lordships of the High Court have gone to the extent of nullifying this.

I may however point out that as for Mr Kane's remarks quoted by Mr. Gujarathi, the 'tangled skein' ought to be resolved, where the Smṛitis are silent, as in this case, by putting interpretations in conformity with equity and justice. As the adopted son undoubtedly confers temporal and possibly (in many cases) spiritual benefit also on the deceased adoptive father and sacrifices his rights in his natural father's family, it seem equitable that he should be allowed to succeed to his deceased adoptive father, and to dispossess the inferior heirs who might have come in his absence, as such heirs took their titles subject to defeasance

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212. History of the Dharmasastra by P.V. Kane, Vol. III, Ch. XVIII, pp. 662-63.

on the contingency of the widow adopting the child. Mr. Gujarathi, however, opines that after the coming into force of the Hindu Adoptions and Maintenance Act 1956, it is only such child as has been adopted during coverture that becomes the natural child of adoptive parents. In all other cases, the adopted child acquires relationships only through the person adopting.

This view however has been rejected by the Supreme Court in Sawan Ram's[214] case and also in a very recent case, Sitabai v Ramchandra,[199] wherein their Lordships approved the decision in Ankush v Janabai.[210]

Andhra view - no divesting

Before passing to those Supreme Court cases we must first see another High Court case to which the Supreme Court referred. In the case of N. Hanumantha Rao v N. Hanumayya,[213] one A had two sons joint with him, B and C. B died in 1924 leaving a widow W. A died in 1936, whereupon W's interest ceased to be capable of fluctuation. On June 17, 1957 W adopted E, a boy of 15. E sued C and C's son F for partition and possession of a half share in the family properties. The Andhra High Court held that the adoption of E could not have the effect of divesting the interest that had belonged to B and had passed by survivorship to C prior to the adoption. The decision rested on two feet: firstly, that all adoptions take effect now from the date of the adoption; secondly, that no property that has vested can be divested. The Andhra

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213. [1964] 1 An. W.R. 156; criticised severely by the Supreme Court in Sawan Ram v Kalawanti [1967] A.I.R. S.C. 1761 below.

Pradesh High Court held that, on account of the specific provision made in Section 12 of the Hindu Adoptions and Maintenance Act 1956 that the rights of the adoptee are to be determined with effect from the date of adoption, the rights of the adopted son, which were rested on the theory of "relation back" can no longer be claimed by him and that clause (c) of the proviso to Section 12 lays down the explicit rule that the adoption of a son or daughter by a male or female Hindu is not to result in the divesting of any estate vested in any person prior to the adoption. This would appear to many readers to be an natural, even inevitable, construction to put upon the statute.

Supreme Court decisions - relation back stands

The Supreme Court in the difficult case of Sawan Ram v Kalawanti[214] were unable to accept this interpretation of the provisions of the Act by the Andhra Pradesh High Court, as the High Court had ignored two important provisions of the Act and did not consider their effect when arriving at its decision. The first provision in which the Supreme Court have detected great significance is contained in S. 5(1) of the Act which lays down:

> "No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this Chapter, and any adoption made in contravention of the said provisions shall be void". (emphasis mine).

It is significant that, in this section, the adoption to be made is mentioned as "by" or "to" a Hindu. Thus adoption is

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214. A.I.R. 1967 S.C. 1761. Discussed by Derrett at [1968] 70 Bom. L.R.(J) 51-55 and also by G.K. Dubke at Nov. [1968] Bom. L.R.(J) 143-148. Discussed at p. 359 and 361 respectively.

envisaged as being of two kinds. One is adoption by a Hindu, and the other is adoption to a Hindu! If the view canvassed on behalf of the appellant were accepted, the consequence would have been that there will be only adoptions by Hindus and not to Hindus. On the face of it, adoption to a Hindu was intended to cover cases where an adoption is by one person, while the child adopted becomes the adopted son of another person also. The most common instance will be that of an adoption by a female Hindu who is married and whose husband is dead, or has completely and finally renounced the world or has been declared to be of unsound mind. The second provision which was ignored by the Andhra Pradesh High Court is the one contained in Section 12 itself. The section not only lays down that the adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption, but also lays down that from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those in the new family.

A question naturally arises what is the adoptive family of a child who is adopted by a widow, or by a married woman whose living husband has completely and finally renounced the world or has been declared to be of unsound mind? It is well recognized that, after a female is married, she belongs to the family of her husband. The child adopted by her must also therefore, belong to the same family. On adoption by a widow, therefore, the adopted son is to be deemed to be a member of the family of the deceased husband of the widow. Further still, he loses all his rights in the family of his birth and those rights are replaced by the rights created by

the adoption in the adoptive family. The right which the child had, to succeed to property by virtue of being the son of his natural father, in the family of his birth, is thus clearly to be replaced by similar rights in the adoptive family, and, consequently, he would certainly obtain those rights in the capacity of a member of that family as an adopted son of the deceased husband of the widow or the married female taking him in adoption. This provision in Section 12 of the Act, thus itself makes it clear, that on adoption by a Hindu female who has been married, the adopted son, will, in effect, be the adopted son of the husband also. This aspect was ignored by the Andhra Pradesh High Court when dealing with the effect of the language used in other parts of this section.

In view of the special provision contained in Clause (c) of the proviso to Section 12 of the Act viz., 'the adopted child shall not divest any person any estate which vested in him or her before the adoption', it appears, observed their Lordships of the Supreme Court that the Act had narrowed down the rights of an adopted child as compared with the rights of a child born posthumously. Under the Shastric law, if a child was adopted by a widow, he was treated as a natural-born child and consequently, he could divest other members of the family of rights vested in them prior to his adoption. It was only with the limited object of avoiding any such consequence on the adoption of a child by a Hindu widow that these provisions in Clause (c) of the proviso to Section 12 and Section 13 of the Act were incorporated. This restriction was placed on the rights of a child adopted by either a male or a female Hindu and not merely in a case of adoption by a female Hindu. This restriction on the rights of the adopted

child cannot therefore, in the opinion of their Lordships of the Supreme Court, lead to any inference that a child adopted by a widow will not be deemed to be the adopted son of the deceased husband.

I may also point out here that Section 4 of the Hindu Adoption and Maintenance Act 1956 provides that any text, rule or interpretation of Hindu law in force immediately before the commencement of the Act shall cease to have effect with respect to any matter for which provision has been made in the Act.

The Act is of a prospective or substantive nature and ordinarily it cannot have retrospective effect 'save as otherwise expressly provided'. The section seeks to repeal all existing laws whether in the shape of ancient texts, customs or legislative enactments which are inconsistent with the provisions of this Act. Thus (i) matters not dealt with in this Act shall continue to be governed by the old Hindu law and (ii) matters expressly saved by this Act will also continue to be governed by old Hindu law. In other words, one more reason could be added in favour of the Supreme Court's decision i.e., that, as the Act is silent on the point of relationship of an adopted son of a widow with that of her deceased husband, the old Hindu law will apply: i.e., the theory of relation back still stands.

Same view of Allahabad High Court

In this connection the observations made by their Lordships of the Allahabad High Court in the case of Subhash

Misir v Thagai Misir[215] deserve to be noticed. On reading sections 12 and 14 together one finds there is no mention as to what relationship the adopted child will bear with the deceased husband of a widow who has not remarried. The only thing which we find in Section 12 of the Act is that the adoption severs all his family ties and connections with the family of his or her birth and they are replaced by those created by the adoption in the adoptive family. On adoption the adopted child becomes a member of the family wherein he or she is adopted. 'In the absence of any provision to the contrary it is not unreasonable to infer that the child adopted by the widow should be held to be the son of the widow as well as her deceased husband', i.e. vice versa the son of the husband as well as the (adopting) widow.

> 'The absence of any specific provision on this point suggests that the common notion that was held before the coming into force of this Act was accepted by the legislature so far as the relationship of the adopted child vis-à-vis the husband of the widow was concerned. This Act has only removed the bar of permission placed on the adoption by a female'.

Before the coming into force of the Act a Hindu widow could not, except in Bombay and Madras, adopt any person without the permission of her husband. But with the passing of this Act she could adopt even without the permission of her husband as provided by Section 8 of the Act. An adopted son has all the rights of a natural son and it is reasonable to hold, their Lordships in Thagai Misir's[215] case observed that in the circumstances he should be accepted to be the son of the husband of the widow. It would be very harsh, observe their

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215. A.I.R. 1967 Allahabad 148.

Lordships, if in such a case the adopted son who severs all his connections from the family of his birth does not get anything in the adoptive family on the ground that he is adopted by the widow. In Madras and Bombay even before the Act (under the old Hindu law) a widow could adopt without the permission of her husband and the various authorities of the Madras High Court would show that such adopted son was always treated as the son of the husband of the widow. In the view of their Lordships of the Allahabad High Court the same status should be given to the adopted son after the passing of the Act in other states as well. The learned judge makes a reference to para. 180 of 'Introduction to Modern Hindu Law' by J.D.M. Derrett where the author, after dealing with Sections 12 and 14 of the Act has opined that for the purpose of inheritance and maintenance an adopted child is precisely upon the same footing as a legitimate child and from this the learned judge has deduced, though it seems wrongly, that according to this view also, as soon as the adopted son of the widow is held to be the legitimate son of the widow's husband, the latter would be deemed to be the father of the adopted child.

Derrett's opinion - relation back stands

Prof. J.D.M. Derrett in his article entitled 'Adoption in the Joint Hindu family: A recent Supreme Court decision and its Limits';[216] observes:

> "It is clear that none of the statutes of the "Hindu Code" may be taken to have affected rights arising in the Mitakshara joint family more than the express words or necessary intendment of the statutes require. Thus, as this

216. Bom. L.R. (J) April '68: pp. 51-55. For an earlier view of Derrett that after Dec. 21, 1956, no adoption will give any right to divest any person of any property, and for a review of cases from Anant v. Shankar A.I.R. 1943 P.C. 196 onwards see article by Derrett: Recent Decisions and some Queries in Hindu Law: 1. Adoption; [1957] 59 Bom. L.R., J., 178-182.

> writer foretold, the possibility of a son adopted by a widow having the right to reopen partitions, dispute alienations, and generally represent his deceased father as to his interest in joint family property remains. But this possibility is delimited by some aspects of the legal situation obtaining after 1956...".

Derrett says that prior to 1956 the interest passed by survivorship or th the widow herself under the Act of 1937. Where the father died before 1956 it may be worthwhile pursuing the adopted son's rights, even to the extent of investigating the improper alienations of joint family property (other than those made by the sole surviving coparcener himself).[217] After 1956 the interest in joint family property will pass by testamentary or intestate succession in every case because the presence of the widow (who adopts) makes this certain (Section 6 of the Hindu Succession Act 1956). Prof. Derrett further observes

> "Now since (the doctrine of) relation back has been reprieved, the adopted son must be understood as alive, at the moment of the adoptive father's death. Thus there are three people to be considered, the father himself, his widow (the adoptive mother-to-be) and the (adopted) son, hence the proportion that passes to the heirs is one-third (i.e. see Rangubai's case)".[218]

Thus, according to Derrett the adopted son will get his share in the one-third share of his adoptive father (according to the rules of devolution in the Hindu Succession Act) together with his birthright in respect of one-third of that estate (the mother will be entitled absolutely to her third under the Bombay ruling in this matter, which Prof. Derrett holds,

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217. Babgonda Ramgonda v Anna [1967] 69 Bom. L.R. 523.

218. Rangubai Lalji v Laxman Lalji [1966] 68 Bom. L.R. 74 followed in Ananda Naik v Haribandhu Naik [1967] A.I.R.Or. 194.

must be taken as correct). This view is in conformity with the view I have expressed earlier i.e. as the Act is silent on the point of relationship of an adopted son of a widow with that of her deceased husband, the old Hindu Law will apply (vide Section 4 of the Hindu Adoptions and Maintenance Act 1956) i.e. the theory of relation back still stands.

Dabke's article in Bom. L.R. (J) - Takes opposite view

Mr G.K. Dabke in his article 'Divesting on adoption', however, takes a different view.[219] He refers to the decisions of the Bombay High Court in Ankush Narayan v Janabai Rama[210] and the Supreme Court in Sawan Ram v Kalawanti[214] wherein it was held that when a wife or a widow validly adopts a son, he becomes the son of her husband, alive or dead. He observes that the Bombay High Court had mainly based its decision on the interpretation of S. 12 of the Act, while the Supreme Court had mainly based it on the words 'by' or 'to' in S. 5(1) thereof. The view of the Supreme Court was that the word 'to' clearly contemplates adoption to some person other than the actual adoptive parent, and as adoption to any other person except the husband or wife of the adoptive parent is not permissible under the Act, the word 'to' must mean adoption by a male to his wife or by a female to her husband whether alive or dead. Mr. Dabke observes that Sections 7 and 8 of the Act clearly exphasise the position that adoption can be only to oneself and that unless no interpretations other than those placed by the Bombay High Court on S. 12 and by the Supreme Court on the word 'to' in S. 5(I) of the Act, are

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219. [Nov. 1968] Bom. L.R. (J) pages 143-148. See also Dabke's article: The little word "TO" in S.5(1) of the Hindu Adoption and Maintenance Act, [1969] 71 Bom. L.R., J., 13.

possible, it would not, according to him, be correct to say that the Act contemplates adoption to any other person except the adoptive parent. He says that the Act does not presuppose that every adopted child must have both parents after adoption, for, under the Act a bachelor or spinster could adopt. He further points out that if the interpretation placed by the Bombay High Court on S. 12 were correct it would follow that a child adopted by a male with the consent of his wife would automatically become the child of the wife and S. 14(1) will have to be treated as redundant. As to the interpretation of the word 'to' in S. 5(I), Mr. Dabke points out that at least one interpretation other than that placed by the Supreme Court is possible. He observes that Section 11(vi) of the Act enjoins that there must be actual giving and taking, but permits performance of that Act by another under the authority of the adoptive parent. He refers to Mulla's treatise on Hindu Law (13th edn., p. 928) to confirm his position "Likewise an adoptive father or the adoptive mother can authorize any person to accept the child in adoption on his or her behalf". He urges that an agent's act is not an act of the agent but of the principal. According to Mr. Dabke, it is in this context that the words 'by or to' appear to have been used in S. 5(I) of the Act and not with a view to enable anybody to foist a child on any person (alive or dead), other than the adoptive parent.

It may however be pointed out here that Section 14 of the Hindu Adoption and Maintenance Act 1956 which deals with the relationships of a spouse to the child adopted by the other spouse seems, as if deliberately, silent as to the adopted child's relationship with the deceased spouse of the

adopter. Also according to Section 4 of the Act, on the points on which the Act is silent the old Hindu law will apply. It would appear, therefore, that on a correct interpretation of the Act, the theory of relation back stands. The recent decision of the Supreme Court in Sawan Ram's[214] case and Sitabai v Ramchandra[199] unequivocally uphold the theory of relation back, but without explainigg in detail what its effects will now be.

Recent decision of Madras H.C. - takes view opposite to that of Supreme Court and latest Supreme Court decisions

Recently the Madras High Court unaware of the Supreme Court decision in Sawan Ram's[214] case, has held, in the case of Arumugha Udayar v Valliammal,[220] that a widow has no capacity to make an adoption to the deceased husband. In this case one Balayee Ammal succeeded to the properties of her husband, Nallathambi, she made several alienations and Nallathambi's sisters (Plaintiff's in present litigation) instituted proceedings in 1951 and obtained a declaration that the alienations would not be binding on the reversioners after the lifetime of Balayee. She died on 17-1-60 and Nallathambi's sisters filed a suit for recovery of possession of the properties from the alienees on the basis of the declaration secured in the prior litigation aforesaid. Balayee appeared to have adopted her younger sister's son, minor Ganapathi on 31-12-59 and on the same day she had also executed a registered deed of adoption acknowledging the said adoption. The contesting defendants i.e. the alienees and

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220. [1969] A.I.R. Mad. 72.

their representatives resisted the suit on the ground that the Plaintiffs had no title to sue and that as a result of the adoption, the minor Ganapathi became the nearer heir to the estate of Nallathambi. The Subordinate Judge found that the adoption had been made out. But (on the question of law) he differed from the trial court and decreed the suit holding that the son adopted by a widow would be an heir only to the properties of the widow and not to the estate of her deceased husband. Thus in the second appeal before the Madras High Court the question raised was the question of law as to whether an adopted son who was adopted by a Hindu widow after the Hindu Adoptions and Maintenance Act 1956 came into force would be entitled to the properties which the widow (the adoptive mother) took as an heir to her husband.

The judgement was delivered by Ramamurti J. who observed that under the Hindu Adoptions and Maintenance Act 1956 adoption was a purely secular institution and had lost all its religious significance. It is because of this vital change that the Act provides that a woman can make an adoption - whether married or unmarried and the child adopted may be a boy or a girl. The necessary consequence is, according to his Lordship, the discrimination between a male and a female based upon religious considerations in the law of adoption has to disappear under the Act.

His Lordship observed that reading sections 4 and 5 of the Hindu Adoptions and Maintenance Act 1956 together it is clear that there is no field in which any portion of customary law could operate with respect to adoption as unabrogated Hindu law. If the theory of affiliation to the deceased spouse is accepted, it would cut at the root of S. 8,

which confers unqualified power upon all the widows irrespective of what any one of the widows may do in the matter and also would render many of the important provisions of the Act useless and unworkable. According to his Lordship the object underlying S. 7 is completely to abrogate the customary Hindu law under which a male Hindu can foist the relationship of an adoptive mother upon his wife without her consent or even despite her objections. After the Act, if the requisite consent of the wife is obtained the wife is regarded as the adoptive mother because the adoption so made by a male Hindu is not only by himself but by his wife as well. In the case of a Hindu female, there is no such provision for her taking an adoption during the husband's lifetime even if he consents and there is no provision corresponding to S. 14 for the affiliation of the adopted child to the deceased husband. Apart from the four specified classes of cases dealt with under Section 14 there is no further affiliation by fiction. In the face of Sections 4 and 5, says his Lordship, it is impossible to read into the Act any such power of affiliation by necessary implication. His Lordship further says that the rule of necessary implication cannot be invoked when it would be inconsistent with what is expressly declared in the Statute itself i.e. Sections 7, 8 and 14.

As regards S. 12, his Lordship observes that it does not state that <u>all</u> ties of the child in the family of its birth are severed and they are replaced in the adoptive family. The replacement is not that all ties are lost in the natural family, but it is only those created by the adoption in the adoptive family. S. 12 by itself is not decisive, and does

not lead to the necessary conclusion that there is an affiliation to the deceased spouse, maintains his Lordship. Under the Act an adoption by a male and a female are placed on the same footing and there is no scope for invoking the doctrine that the widow makes the adoption as the surviving half of the husband and as his representative. Section 12 states that the adoptive child shall be deemed to be the child of his "or" her adoptive father. The word used, observes his Lordship, is "or" and not "and". Further the relations are replaced only with effect from the date of the adoption and not retrospectively. If on an interpretation of sections 5, 8, 11 and 14 the tie of an adoptive father based upon the theory of affiliation is not created, S. 12 does not improve the position. His Lordship further observes that the theory of vesting and divesting has no place after the Act as seen from proviso (c) to Section 12 and states that if the main affiliation by fiction to the husband does not exist, the other collateral relationships do not arise at all. His Lordship dissented from the cases of Ankush Narain v Janabai[221] and Subhash Misir v Thagai Misir[222] and referred to the cases of Sivagami Achi v Somasundaram Chettiar[223] and to Mulla's Hindu Law 13th Edition, p. 483, section 455. Referring to Ankush's[221] case his Lordship observed that the main reasoning was that under S. 12 and sub-section (6) of Sec. 11 of the Act there is a complete severance of all ties of the child given on adoption in the family of his or her birth and correspondingly "these

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221. A.I.R. [1966] Bom. 174.

222. A.I.R. 1967 All. 148.

223. A.I.R. 1956 Mad. 323 (F.B.).

very ties of the child become automatically replaced in the adoptive family". The effect of the adoption is to completely transfer the child from the family of its birth to the family of its adoption. The several deeming provisions of Section 14 of the Act tend to the same view. Sections 5 and 8 of the Act do not warrant the view that after the commencement of the Act, the widow can make an adoption only to herself and it was not competent for her or permissible for any widow to take any child in adoption to her deceased husband. The acceptance of the rival view, observed their Lordships, would result in absurd results that while the adopted son would lose all his ties in his natural family, he would not become related to the deceased husband or the husband's collateral relations and there is nothing in the Act to indicate that the provisions in the Act were intended to abrogate the position which existed under the customary Hindu law as regards the new ties of the adopted son in the adoptive family, in consequence of his adoption by a widow.

According to Ramamurty J., the two Acts (viz. the Hindu Succession Act and the Hindu Adoptions and Maintenance Act 1956) have introduced far-reaching vital changes sweeping away and cutting at the root of the old traditional and conservative notions and concepts of customary Hindu law. It may however be pointed out here that relation back was not a creation of customary Hindu Law but of Judicial decisions based on considerations of equity and Justice. Also surprisingly enough there appears to be no reference in this case to the Supreme Court decision in Sawan Ram v Kalawanti.[214] I am unable to agree with the views of Ramamurti J. on most points especially on the interpretation put by him on Sections 4 and

5 of the Hindu Adoptions and Maintenance Act 1956 for reasons already stated by me above (on page 357). With reference to Ramamurti J's observation (referred to at p. 334 above) that under the Hindu Adoptions and Maintenance Act 1956 adoption was a purely secular institution and had lost all its religious significance, I may repeat my observations made at p. 322 above that the adopted son undoubtedly confers temporal benefit also on the deceased adoptive father for he continues the family name and discharges all the obligations which a natural born son would otherwise have discharged. Also the adopted son sacrifices his rights in his natural father's family and it would be inequitable not to allow him similar rights in his adoptive family. Also as observed by their Lordships of the Supreme Court in Eramma v Muddappa,[224]

> "... it is sufficient to say that the real object behind her adoption is the belief in general that unless there is a son to offer oblations to the deceased ancestor their souls will not reach the higher regions and may even sink into hell. The mere existence of a daughter is not sufficient to save the souls of ancestors and that is why a sonless Hindu makes an adoption of a son even though he may have a number of daughters".

I am therefore more inclined to agree with their Lordships views in the case of Sawan Ram[214] and Sitabai[225].

In Raj Kumar Mohan Singh v Raj Kumar Pasupatinath[226] the Supreme Court held that the adoption contemplated to be made by a Taluqdar or by his widow with his consent under the

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224. A.I.R. (1966) S.C. 1137.

225. A.I.R. 1970 S.C. 343.

226. A.I.R. 1969 S.C. 135.

Oudh Estates Act I of 1869 has not the incidents and consequences of adoption under the Hindu Law. The Talukdars belonged to the Hindu, Mohammadan, Christian and Sikh communities. The personal laws governing the Hindus and Sikhs recognize adoption and the creation of rights in the adopted sons. Amongst the Mohammedans and Christians no adoptions are recognised by their personal laws. Under the Oudh Estates Act it was open to a Taluqdar, whatever his persuation, to authorise by writing his wife to adopt a son. To such an adoption the personal law had no application. In matters not expressly covered by provisions of the Oudh Estates Act, the personal law of the Taluqdar may be applicable, but the right of adoption not being uniformly exercisable by the Taluqdars according to their personal laws, the peculiar incidents of Hindu adoptions have no application. Under the Hindu law adoption has primarily to be viewed in the context of spiritual rather than temporal considerations, observed their Lordships of the Supreme Court, and the devolution of property is only of secondary importance. The spiritual considerations are out of tune in considering the status of a son adopted by a Muslim or by a Christian. Under the Hindu law the adoption made by a Hindu widow relates back to the date of death of the adoptive father, but in the absence of any express provisions in the Act, their Lordships observed that it would be impossible to attribute to the adoption made by a widow of a taluqdar, pursuant to the authority given by her husband, the incidents of an adoption under Hindu law. It is a necessary concomitant of the doctrine of relation back, that the adopted son takes the estate of his father as if he were in existence at the date of his death. Any attempt to give to the adopted

son an interest or right which is deemed to commence from the date of the adoptive father's death so as to divest the estate which is already vested in the widow, observed their Lordships, is not only inconsistent with the personal law of a taluqdar who is not a Hindu or Sikh but comes in conflict with the express provisions of S. 22(7) of the Oudh Estates Act (1869). The Act provides that a son adopted by a widow in pursuance of instructions given by her husband takes the property on her death and not before. It is thus clear, their Lordships observed, that the doctrine of relation back is not applicable to an adoption made by the widow of a taluqdar governed by the Act. Their Lordships reversed the decision in Raj Kumar Mohan Singh v Raj Kumar Pashupati Nath.[227] I must emphasise that I adduce this authority to show, by contrast with the position under the Oudh statute, how the general Hindu law has consistently been viewed by the Supreme Court.

In the very recent case of Smt. Sitabai and Another versus Ramchandra[225] the Supreme Court approved the decision of the Bombay High Court in Ankush v Janabai[228] and held that Sureshchand i.e. the son adopted by a widow became the adopted son of both the widow and her deceased husband and, therefore, became a coparcener with the sole surviving coparcener Dulichand the adoptive uncle in the joint family properties. After the death of Dulichand, the adopted son, Sureshchand, became the sole surviving coparcener and was entitled to the possession of all joint family properties. The facts of the case are that Dulichand and Bhagirath were brothers and the

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227. I.L.R. (1964) 2 All. 191.
228. 67 Bom. L.R. 864.

properties concerned were ancestral. The Plaintiff Sitabai was the widow of Bhagirath, who pre-deceased Dulichand, his elder brother in 1930. It was admitted by both the parties that after Bhagirath died, the plaintiff Sitabai was living with Dulichand as a result of which connection an illegitimate child the defendant Ramchandra was born in 1935. Dulichand died on March 13, 1958. Sometime before his death Sitabai adopted Plaintiff No. 2 Suresh Chandra and an adoption deed was executed on March 4, 1958. After the death of Dulichand, Ramchandra took possession of the joint family properties. The Plaintiff therefore brought the present suit for ejectment of the defendant Ramchandra, the illegitimate son of Dulichand, from the disputed properties. One of the questions which arose for decision before the Supreme Court was whether Suresh Chandra, Plaintiff No. 2, when he was adopted by Bhagirath's widow, became a coparcener of Dulichand in the Hindu joint family properties. The High Court had taken the view that Suresh Chandra became the son of Plaintiff No. 1 with effect from 1958 and Plaintiff No. 2 would not become the adopted son of Bhagirath in view of the provisions of the Hindu Adoptions and Maintenance Act, 1956 (Act 78 of 1956). It was argued on behalf of the appellant that the High Court was in error in holding that the necessary consequence of a widow adopting a son under the provisions of Act 78 of 1956 was that the adoptee would be the adopted son only of the widow and not of her deceased husband. But in the opinion of their Lordships of the Supreme Court the argument put forward on behalf of the Appellant was well founded and it was accepted as correct. Their Lordships observed

"The scheme of Sections 11 and 12 of the Hindu

> Adoptions and Maintenance Act, 1956 is that in the case of adoption by a widow the adopted child becomes absorbed in the adoptive family to which the widow belonged. In other words the child adopted is tied with the relationship of sonship with the deceased husband of the widow as his adoptive father. ... It is a necessary implication of Ss. 12 and 14 of the Act that a son adopted by the widow becomes a son not only of the widow but also of the deceased husband. ... The true effect and interpretation of Ss. 11 and 12 of the Act is that when either of the spouses adopts a child, all the ties of the child in the family of his or her birth become completely severed and these are all replaced by those created by the adoption in the adoptive family. In other words the result of adoption by either spouse is that the adoptive child becomes the child of both the spouses".

I agree with their Lordships of the Supreme Court for the reasons already mentioned by me at pages 352, 357, 361, 362-363 367-369 above. It would also appear that the law relating to reopening of partitions and questioning of alienations is continual as a result of the Supreme Court's decisions and the law relating to relation back stands as it was in the pre-HAMA period.

The decision in Sitabai v Ramchandra[229] has been criticized by Mr. G.K. Dabke in his recent article in the All India Reporter entitled 'Nate on Sitabai v Ramchandra'.[230]

Mr. Dabke says that the main object of codification of law relating to Hindu Adoptions must have been to avoid mischief of unsettling old titles and that the recent pronouncement of the Supreme Court in Sitabai v Ramchandra[229] appeared to perpetuate the said mischief with respect to coparcenary property.

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229. A.I.R. 1970 S.C. 343.

230. A.I.R. 1970 August (Journal Section) pages 99 to 101.

It may however be pointed out here that this is merely Mr. Dabke's presumption, for it is nowhere stated in the Hindu Adoption Act that this was the main object of the Act. In fact the Act is completely silent on the relationship of the deceased husband to a son adopted by his widow, even though there was the occasion and necessity (in Section 14 of the Act) to define such relationship. But in view of the various provisions of S. 12 which state that the effect of the adoption is to completely sever the adoptee's ties in the natural family and to replace them with similar ties in the adoptive family; and also in view of S. 4 which in effect amounts to saying that on the points on which the Act is silent the old Hindu law stands and on account of the various reasons already discussed by me under the various recent Supreme Court and High Court decisions above, I am of the view that the decision in Sitabai v Ram Chandra[229] to the effect that the 'relation back' of the son adopted by a widow to his deceased adoptive father still stands, appears to be absolutely correct.

Mr. Dabke also says that the decision is contrary to the clear provisions of S. 12(c) of the Hindu Adoption Act, which lays down that the adopted child shall not divest any person of any estate which might have vested in him or her before the adoption. The effect of this provision has, however, been correctly interpreted by the Supreme Court in Sawan Ram v Kalawanti[214] wherein their Lordships of the Supreme Court observed

> "It appears that, in making such a provision (i.e. referring to S. 12(c) of the Act), the Act has narrowed down the rights of an adopted child as compared with the rights of a child born posthumously. Under the Shastric law, if a child was adopted by a widow, he was treated as a natural-born child and, consequently, he

> could divest other members of the family of rights vested in them prior to his adoption. It was only with the limited object of avoiding any such consequence on the adoption of a child by a Hindu widow that these provisions in Cl. (c) of the proviso to S. 12 and S. 13 of the Act were incorporated. In that respect the rights of the adopted child were restricted. It is to be noted that this restriction was placed on the rights of a child adopted by either a male Hindu or a female Hindu and not merely in a case of adoption by a female Hindu. This restriction on the rights of the adopted child cannot, therefore, in our opinion, lead to any inference that a child adopted by a widow will not be deemed to be the adopted son of her deceased husband".

Reading this interpretation of S. 12(c) with the other clauses of S. 12 according to which the adoption results in complete severance of ties in the adoptee's natural family and his complete substitution in the adoptive family and also in view of the effects of S. 4 and other sections of the Adoption Act already discussed above, I am completely in agreement with this interpretation of S. 12 (c) of the Act.

Mr. Dabke next criticizes the Supreme Court decision in respect of the house which was bequeathed by Dulichand (who was the sole surviving coparcener at that time) to Ramchandra the Defendant. The Supreme Court in its judgment had restored the decision of the District Judge who took the view that the will executed by 'D' was valid so far as half of his share in the house was concerned, and, therefore the defendant was entitled to claim half the share of the house in dispute. In this connection it may be pointed out that S. 6 of the Hindu Succession Act 1956 does not disturb the special rights of those who are members of the Mitakshara coparcenary or the rule of survivorship in coparcenary property. Where, therefore a male Hindu having an interest in a Mitakshara coparcenary dies, his interest will devolve

by survivorship upon the surviving members of the coparcenary and not in accordance with this Act. If however, he dies leaving female heirs of Class I to the Schedule or a male relative specified in that class who claims through such female relation, his interest will develop in accordance with the Hindu Succession Act either by testamentary Succession under S. 30 of the Act or by Intestate Succession under S.8. In such cases the interest of the dedeased coparcener will be deemed to be such share in the property which would have been allotted to him, if a partition had taken place just prior to his death (vide Expl. 1 to the section)

Thus in view of S.6 of the Hindu Succession Act 1956 discussed above and also in view of the Supreme Court decisions[214] and [229] that the adoption of a son by the widow relates back to the death of the deceased adoptive father, the above decision of the Supreme Court that the will executed by 'D' was valid to the extent of half of his share in the house is correct and Mr. Dabke's contentions appear to be mistaken.

An attack on Sawan Ram's case[214] has also been made by Paras Diwan[231] and an attack on both Supreme Court cases is made by B.N. Sampath.[232] The arguments of these writers, as

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231. (1969) 21 Law Review (Punjab) pp. i-xviii.

232. B.N. Sampath: The Doctrine of Relation Back: An unfortunate revival [1970] 2 S.C.J., J., 1-10.

in the case of Mr. Dabke, are unconvincing and my above discussion in support of the Supreme Court cases applies to the views expressed by these writers as well.[232a]

The decision of the Supreme Court in Sitabai v. Ram Chandra[229], has been followed by the Delhi High Court in Duni Chand v. Paras Ram[232b] wherein it was held that the son adopted by the widow becomes absorbed in the adoptive family to which the widow belonged and becomes the son not only of the widow but also of her deceased husband. Hence he will be the preferential heir of her deceased husband qua the other collaterals. Khanna C.J. observed that the true effect and interpretation of Sections 11 and 12 of the H.A.M.A., 1956 was that when either of the spouses adopts a child, all the ties of the child in the family of his or her birth become completely severed and these are all replaced by those created by the adoption in the adoptive family. In other words, the result of adoption by either spouse is that the adoptive child becomes the child of both spouses.[232c]

232a. The various Supreme Court and other cases as well as the the Articles by Dabke and others have been reviewed and commented upon by Prof. J.M.D.Derrett in a recent article entitled: Adoption and Relation Back: The Position in 1971; [1971] 73 Bom. L.R. (J) 31. Derrett observes that relation back is still alive and that S.12, prov. (c) will have its effect, if we confine divesting to property which did not vest absolutely and finally in a definite person, e.g. a legatee under a will is such a person, but a surviving coparcener is not.

232b. A.I.R. 1970 Delhi 202.

232c. In his 'A Critique of Modern Hindu Law' (Bombay, Tripathi) 1970, pp. 137 ff, Derrett observes, and it seems rightly, that relation back will not occur in non-sacramental adoptions. This point seems to have been overlooked by almost all other writers on modern Hindu law.

The English Law

The English adoptions introduced affiliation into the family and fictional paternity from the date of the adoption, but they did not envisage the refinements which the Hindu law of adoption had reached. Under the Shastric Hind law, adoption had the effect of transferring the adopted boy from his natural family into the adoptive family. It severed all his ties with the family in which he was born and invested him with the same rights and privileges in the family of the adopter as the legitimate son, subject to certain exceptions. Adoption of a son by a widow related back to the date on which the adoptive father died and the adopted son by a fiction of law was to be deemed to have been in existence, as the son of the adoptive father, at the time of the latter's death.

None of the other systems of law gave retrospective operation to an adoption made by a widow to the date of her husband's death.

CHAPTER VII

SUCCESSION EX PARTE MATERNA AND DETERMINATION OF THE ADOPTIVE MOTHER IN CERTAIN CASES

View of the Dattaka Mīmāṁsā and Dattaka Chandrikā

On this subject the author of the Dattaka-Mimamsa lays down the following rule:

> "The forefathers of the adoptive mother only are also the maternal grandsires of sons given and the rest; for the rule regarding the paternal is equally applicable to the maternal grandsires (of adopted sons)".[1]

The Dattaka-Chandrika states that

> "Where there may be a diversity of mothers, the sires of the natural mothers are first designated by a son, who is son to two fathers, at the funeral repast in honour of the maternal grandsires, subsequently the sires of her who is the adoptive mother, where the paternal sires are honoured there certainly are the maternal. But the absolutely adopted son presents oblations to the father and to the other ancestors of his adoptive mother only, for he is capable of performing the funeral rites of that mother only".[2]

Commenting on these passages Sutherland says that

> "an adopted son likewise represents the real legitimate son in relationship to his adoptive mother whose ancestors are his natural grandsires."

Adoptee's rights of succession to maternal relations not recognised in early cases

W. Macnaghten records a case where an adopted son succeeded to his adoptive mother's brother.[3] W. Macnaghten,[4]

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1. Datt. Mim. VI, 50-52; see also pages 383, 386-387.

2. Datt. Chandrika III, 16, 17.

3. 2 W. Mac. N. 88.

4. I.W. Mac.N. 78; Taralankar's Ed., p. 86.

refers to a Bengal case, Gunga Mya v Kishen Kishore[5] in which he thinks the point was decided and adopts the rule that an adopted son does not succeed to the relatives of the adoptive mother.[4] In this case[5] it was held that a son adopted by a woman on whom her father's estate had devolved, will not be entitled to such estate on the adoptive mother's death, which will go to her father's brother's son in default of nearer heirs. Their Lordships of the Sudder Dewany Adawlat observed that according to the Dāyabhāga, an adopted son has no legal claim to the property of a bandhu (or cognate) and according to interpretation of Manu's text, which admits adopted sons to the right of succession collaterally, the meaning is succession to the property of persons belonging to the same family as the adoptive father, as fully appears from the Munwartha Mooktavulee (Manvartha-Muktāvali) compiled by Kullūka Bhaṭṭa and other authorities. Also when an estate devolves on a childless widow, who is held as the half body of her husband, it reverts at her death to the heirs of her husband. So an estate which had devolved on a daughter, who has a weaker claim should, a fortiori, revert to the heirs of her father, quoting the authority of Yājnāvalkya cited in the Dāyabhāga etc.

> "A wife, daughter's son, both parents, brother's, their sons, kinsmen sprung from the same original stock, distant kindred, a pupil and a fellow student in theology; on failure of the first of these the next in order share the estate of him who has gone to heaven without leaving male issues".

According to the opinion of the Pundit, the adoptive mother was lawful heir of her father's property but her estate was only a life estate and on her death the estate should revert

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5. [1821] Select Reports 3 S.D. 170.

to the son of her father's brother. It would appear that the opinion of the Pundits was based on an irrelevant passage of the Dāyabhāga. This decision is referred to in Morun Moee v Bejoy Kishto[6] and in Chinna Ramakrishna v Minatchi Ammal[7] and seems to be the basis of the rule laid down in these cases that an adopted son cannot succeed to his adoptive maternal grandfather's estate when there are collateral male heirs,

In Morun Moee v Bejoy Kishto[6] their Lordships referred to two cases viz. Gunga Mya v Kishen Kishore[5] wherein the dictum of the Pundits was accepted by only one of the judges of the Court but the remaining two judges observed that the dictum was not applicable to the case in question. In that case the appellant (adoptive mother) was held clearly to a right to the portion during her life-time, but it did not appear necessary or proper in the decree to make provision for more than the matter in dispute. The other case referred to was Gunga Pershad Roy v Brijesurree[8] wherein the doctrine in Gunga Mya's case[5] was not adopted by the Court and referred for opinion of the Pundit of the Sadr Court to the effect that bandhus or descendants of maternal grandfather succeed an adopted son on failure of nearer or agnate relations (according to Yajnavalkya quoted in the Dayabhaga). Their Lordships in Morun Moee v Bejoy Kishto[6] observed that a son of some sort was essential to the eternal happiness of man but according to Manu V, 160, a woman needs

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6. (1863) W.R. Sp. NO. [F.B.] p. 121. Also referred to by the Allahabad High Court in Sham Kuar v Gya Din (See under note 9).

7. (1871) 7 Mad. H.C.R. 245.

8. [1859] Part II S.D. 1091.

no mediation, she can ascend to heaven if she devoted herself to pious austerity after her husband's death, hence the adopted son [illegible] adopted before or after the husband's death is adopted for the husbands benefit. Their Lordships further observed that the reason given by Macnaghten in his chapter on adoption why a daughter's adopted son should be excluded from inheriting the estate of the maternal grandfather was that the party so adopted "becomes the son of a person whose lineage is distinct from that of the maternal grandfather". In view of the above opinion prevailing between the years 1821-1850, the Vyavastha given in the case of Gunga Pershad v Brijesurree[8] does not directly over-rule prevailing opinion, observed their Lordships and also that not a text of law or single precedent could be quoted to support the claim, and further it seemed to their Lordships to be opposed to the theory of the Hindu system of adoption and hence they disallowed the claim in the case. Their Lordships further observed that if the right of the adopted son of the daughter had been ever recognised in Hindu Law, some allusion to the adopted son would, necessarily have been made just when barrenness and childless widowhood were described as bars to their rights of inheritance.

In Chinna Ramakrishna v Minatchi[7] also it was held that an adopted son does not succeed to the estate of his adoptive mother's father in preference to the son's son of the brother of the adoptive mother's father. Their Lordships observed that the effect of Macnaghten's Hindu Law (p. 78, 3rd edition) was that the adopted sons succeed collaterally in the family of their adoptive father as sons but not in the family of their adoptive mother. The Dattaka Mimāmsā was in favour of such succession but the general current of Hindu

authorities was silent on the point. Their Lordships next summarised the judgment of 'a very learned judge of Bengal High Court', Justice Sambonath Pandit where the point was most fully considered thus: (a) There was no direct text with the exception of Dattaka Mīmāṁsā nor any case in either of the Presidencies in favour of such right. (b) There was utter silence of law in parts of it where it was expected to speak out on the subject - as where barrenness and childless widowhood are spoken of as bars to inheritance, and where the expression 'capable of bearing children' occurs. (c) As to the arguments in favour of the rights of the adopted child viz., (i) the principle of reciprocity founded upon a Bengal decision in 1859 (authority of which was doubtful),[8] according to Justice Samboonath such reciprocal rights were not invariably any part of the Hindu system of succession. (ii) as to the argument of unfairness that the adopted child loses rights in the natural family the answer given is that even in the case of an after-born Aurasa son, the adopted son gets a diminished share. (d) Although an adopted son succeeds collaterally in the adoptive family, it was not decided whether he succeeds to the full share or proportionate share in case of existence of an after-born Aurasa son alsp. (e) The whole system, according to Justice Samboonath is an anomaly and full of injustice and therefore there is room for the question whether he is qualified, as a son of the body of his adoptive mother would be, to inherit the estate of his maternal grandfather. (f) There was no decision in favour or against except the one referred to, and, excepting two texts of the Dattaka-Mimamsa, the law was silent on the point. (g) Even the two texts of Dattaka Mimamsa were deduced by way of arguments from other

admitted legal positions than to assert positively what the law on the point was, as derived from the sages of antiquity, or as handed down, by tradition, or established by custom.

Mutual rights of succession between adoptee and maternal relations recognised

In Gunga Pershad v Brijesurree[8] it was held that the relatives of an adoptive mother inherit the property of an adopted son, just as they would have succeeded to a natural born son. Referring to Gungamya's case[5] and the bywastha of the Pandit, their Lordships observed that it was obvious that this doctrine was not conclusively adopted by the Court and stands there merely as a dictum of the Pandit who gave it and cannot be said to have acquired all the authority of a recognised principle of Hindu law to which the Sudder Court had intended to give effect. The following was the Vyavasthā of the Pandit of this Court:

> "In the event of a dattaka dying without leaving any heirs of the adoptive father or the said adopted son, the heirs of the father of the adoptive mother are, under the Hindu law, entitled to inherit the property of the said adopted son by right of succession. This bywastha or opinion is in accordance with that of the Dāyabhāga, vivādabhaṅgārṇava, Dattaka Mīmāṁsā and Dattaka Chandrikā etc., prevailing in Bengal District. The first authority was a text of Yajnavalkya to be found in the Dayabhaga etc. - 'If a person dies without a son, grandson or greatgrandson the property devolves on the widow, in default of her, on his daughter ... etc. ... on a bandhu i.e. descendant of the maternal grandfather'. The second authority was a text of Vishnu to the same effect. The third authority was a text of the Dattaka Mīmāṁsā ... 'as adoptive father of an adopted son and his father and grandfather becomes father, grandfather and greatgrandfather of adopted son, in the same manner the father, grandfather and great grandfather of adoptive mother of the said adopted son shall constitute his maternal grandfather, greatgrandfather and maternal great great grandfather'".

In Sham Kuar v Gya Din[9] a full bemch of the Allahabad High Court held that an adopted son, under the Dattaka Mimamsa and Mitakshara, succeeds to the property to which his adoptive mother succeeded as heiress of her father. Their Lordships observed that the Dattaka Mimamsa (S. 1, V. 22; S. 6, V. 6; S. 6, V. 51) and also Manu's texts show that the separation of the adopted son is so complete from the natural father's and mother's families, that, in the absence of texts, it is not assuming too much to infer that affiliation by adoption is into both families of adoptive father and mother. Dattaka Mimamsa S. 5, V. 50 declares that the forefathers of the adoptive mother are also maternal grandsires of sons given and the rest and therefore the rule regarding the paternal is equally applicable to maternal gransires of the adopted son. Their Lordships further observed that a strong argument in favour of the adopted son's right of succession is that he has the right to perform funeral obsequies of the adoptive mother's father.[10] This right of pefforming obsequies indicates a right of heirship in the family of the adoptive mother for according to Manu (IX, 142) "A given son must never claim the family and estate of his natural father" and the reason assigned is because "the funeral cake follows the family and estate" and the same reason is given in the Dattaka Mimamsa (S. 6, V. 51) "the family and estate are the cause of performing the funeral repast" and this doctrine has been held by Sir W. Jones to be the key to the whole Hindu law of inheritance. As the adopted son

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9. (1876) I.L.R. 1 All. 255 (F.B.).

10. Dattaka Mim. S. 6, V's 52, 53.

performs by right obsequies of adoptive maternal grandfather it will follow that he does so because he is amongst the heirs. In Morun Moee v Bejoy Kishto[6] the Pandit's opinion was that the adopted son can inherit the property of his adoptive maternal grandfather although the Bengal High Court held otherwise. In Gunga Mya's case[5] the Pandit's dictum was accepted by one judge only but the majority of the Court expressed no opinion as the point did not arise in that case. In Ganga Pershad's case[8] their Lordships considered Gunga Mya's case[5] and observed that the doctrine merely stood as dictum of the Pundit and held otherwise.

In Teencowree v Denonath[11] the right of inheritance by the adopted son was held to be limited to the adoptive mother's stridhan and did not extend to property inherited from her father and paternal ancestors but this limitation proceeded on the ground that the adopted son cannot perform Sradh of adoptive maternal grandfather, which view, in the opinion of their Lordships in Sham Kuar's case,[9] appeared to be mistaken. It was later well settled in a number of cases that an adopted son had all the rights of a natural-born son in the maternal line as in the paternal line and was therefore entitled to inherit from his adoptive mother and her father and their relations.[12]

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11. (1865) 3 W.R. 49.

12. Kali Komal v Uma Sunker (1883) L.R. 10 I.A., 138, (1883) I.L.R. 10 Cal. 232 affg. (1881) 6 Cal. 257; Dattatraya v Gangabai (1922) 46 Bom. 541; Sounthara[illegible] v Periaveru Thevan (1933) 56 Mad. 759 F.B., Radha Prasad v Ranee Mani Dossee (1906) I.L.R., 33 Cal 947 (F.B.); Venkata v Parthasarthy (1914) I.L.R. 37 Mad. 199; 13 I.C. 166; Joy Kishore v Panchoo (1879) 4 C.L.R. 538; Sundaramma v Venkata (1926) I.L.R. 49 Mad. 941; Puddo Mumari v Jogat Kishore (1889) I.L.R. 5 Cal. 615; these cases are discussed subsequently.

In Uma Sunker v Kali Komal[12] (which case was affirmed by the Privy Council in Kali Komal v Uma Sunker)[12] it was held that succession of the adopted son to relatives of the adoptive mother is in the same way as a legitimate son. In this case the suit was brought to recover possession of property which the Plaintiff contended devolved on him as the adopted son of one Hurosoondoree Debee, the property previously belonged to her father and after his death to her brother. The Defendant's denied the authority to adopt and contended that the adopted son could not succeed to the property of the adoptive mother's father and brother. The case was referred to the full Bench of the Calcutta High Court, wherein their Lordships referred to the following various authorities and drew the following conclusions:

(i) Dattaka Mīmāṁsā, (VI, 50-53) wherein the adopted son is recognised as a substitute for the legitimate son and the performer of funeral repasts as in the case of a legitimate son.

(ii) Dattaka Mīmāṁsā (VI, 50) which states that the adopted son is disconnected from his own maternal family and connected to adoptive mother's family.

(iii) Dattaka Chandrikā (17, iii) which states that the adopted son presents oblations to adoptive mother's ancestors.

(iv) Dattaka Mīmāṁsā (VI, 51) wherein Manu is cited 'The funeral cake follows the family and the estate' and the author of Dattaka Mīmāṁsā argues that the estate of the maternal grandfather like that of the father lapses from the son given and acquires similar rights in the adoptive family and that inheritance of the estate is the cause of his obligations to

perform funeral repasts.

(v) Dattaka Chandrikā (V 22) The conflict between the Rishis, some of whom declare him as being among the six heirs to kinsmen and others as heir to the father only was based on distinction as to his qualities, good or bad.

(vi) "Other kinsmen" in para. 24 (read with para. 22) clearly indicate Sapinda Kinsmen

(Vii) According to the Dāyabhāga, Sec. VI, Ch. IX, para. 19 the maternal uncle is a Sapinda kinsman of his sister's son.

(viii) According to Dattaka Mīmāmsā (IX, 3) and Dattaka Chandrikā (I, 1) the word Sapinda includes kinsmen of the same and different family.

Adopted son's position is similar to the natural son in the maternal line

In Surjokant Nandi v Mohesh Chunder,[13] following the full bench decision of the Calcutta High Court in Uma Sunker v Kali Komul[14] their Lordships of the Calcutta High Court held that the adopted son of one daughter shares equally with the natural son of another daughter in the inheritance left by his maternal grandfather. Their Lordships also observed that no special text or books were applicable to this case and following the Calcutta full bench decision,[14] Held as above. Similarly it was held that the adopted son inherits to maternal uncle,[15] and conversely, those relations inherit to the adopted

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13. (1883) I.L.R. 9 Cal. 71.

14. (1881) I.L.R. 6 Cal. 257.

15. (1883) I.L.R. 10 Cal. 232. (Kali Komul v Uma Sunker).

son.[16]

In Padmakumari v Court of Wards[17] it was held that an adopted son occupies the same position in the family of the adopter as a natural born son, except in a few instances which are accurately defined both in the Dattaka Chandrika and Dattaka Mimamsa, governing authorities in the Bengal school. Also that the adopted son of the maternal grandfather of the deceased, though the gotra into which he was adopted was not the same as the latter's, was an heir nearer to him than such maternal grandfather's nephew. In this case the objection that although the adopted son may inherit collaterally, it must be in the same gotra as the deceased was upheld by the suhordinate judge on the gloss on Manu by Kulluka Bhatta. The High Court reversed the judgment and Justice Mitter said of the gloss in question which is found in Colebroke's Digest (Book 5, Ch. 4, S. 1 Art. 178)

> "In the original phrase 'gotra-dayada' stands for 'heirs to collaterals'. 'Dayada' is equivalent to heirs and 'gotra' to family name. It is said that 'gotra-dayada' means heirs of persons bearing the same family name. It may be that this would be the meaning of the phrase above alluded to if the letters are strictly adhered to. But it appears to me from the context that these words are intended to include all the collateral members of the family who stand in the relation of Sapinda etc. to the adopted son. But granting that the literal construction should be adhered to, does the text in question support the conclusion of the lower Court? It lays down simply that the first six kinds of sons are heirs to the kinsmen sprung ffom the same family. It is not necessarily implied thereby that any one of these six descriptions of sons is not entitled to inherit to the estate of kinsmen sprung from a different family".

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16. (1909) I.L.R. 33 Bom. 404. (Anandi v Hari Suba).

17. (1882) I.L.R. 8 Cal. 302.

His Lordship further observed that the limitation of the right of the adopted son to succeed to his collateral relations is contrary to the whole theory of the Hindu law of adoption. An adopted son occupies the same position as the natural born, except in a few specified instances, in the family of the adopter, and no text has been produced to show that the adopted son cannot succeed to the estate of such relatives of his father as are sprung from a different family. The Dattaka Chandrika (S. 5, para. 24) says

> "Therefore by the same relationship of brother and so forth, in virtue of which the real legitimate son would succeed to the estate of a brother or other kinsmen, where such son may not exist, the adopted son takes the whole estate even".

The Doctrine of the Dayabhaga (10, viii) that the adopted sons are not heirs of collateral relations (Sapindas) etc., which is opposed to the text of Manu was considered by the Privy Council in Sumbhoochunder v Naraini Debee,[18] it was held that the adopted son succeeds not only lineally but collaterally to the inheritance of his relations by adoption. It would appear that in Padmakumari v Court of Wards[17] the adopted son's right to succeed to Bhinnagotra sapindas seems to be recognized by the Court on the negative ground that no text lays down that the adopted son cannot succeed to the estate of relations of the father sprung from a different family. Even on equitable grounds it seems perfectly justified that the adopted son should have a right to succeed to the estate of maternal and collateral relations. The adopted son's ties in his natural family are completely severed on

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18. (1835) 5 W.R. (P.C.) 100, 3 Knapp. P.C. 55.

adoption and equity and justice demand that similar rights should be given to him in the adoptive family. There does not seem to be any reason why any distinction should be made between a natural and adopted son because the adopted son takes the place of the natural son in all functions temporal and spiritual, including the right to perform the funeral obsequies of the adoptive mother's father etc;[10] As rightly argued by their Lordships in Sham Kuar v Gya Din,[9] and on the basis of Manu's text, (IX, 142) repeated in the Dattaka Mimamsa (see page 352 above). The adopted son does seem to have the right to succeed in the adoptive mother's family and to collateral relations.

Childless daughters can improve their position by adopting

In Radha Prasad v Ranee Moni Dassee[19] it was held that the adopted son holds precisely the same position as a son born, as regards inheritance from the adoptive mother's relations and the status of an adopted son, unless modified by express texts, is similar to that of a son born, as regards the performance of periodical obsequial ceremonies and inheritance. Their Lordships observed that in Bengal, by adoption, a daughter attains the status of a daughter with a son. The cases of Puddo Kumaree v Jogat Kishore[12] and Uma Sunkar v Kali Komal[12] had finally settled the law that an adopted son holds precisely the same position as a son born as regards inheritance from the adoptive mother's relations and that the status of an adopted son, unless modified by express texts was similar to that of a son born as regards

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19. (1906) I.L.R. 33 Cal. 947.

performance of periodical obsequial ceremonies and inheritance. Their Lordships in Radha Prasad v Ranee Moni[19] observed that Ranee Moni must be recognised as a daughter with a son and she stood in the same position under the Hindu law as her sister Prem Moni. Thus the institution of adoption is quite useful for childless daughters, for, by adopting a son they get all the advantages which they would have had only if they had Aurasa sons.

Adoptive mother preferred to adoptive father for succession to adopted son's property

In Anandi v Hari Suba[20] it has been held that under the Mitakshara school of Hindu law the adoptive mother is entitled to succeed, in preference to the adoptive father, to a son taken in adoption. In this case, on the death of the adopted son unmarried, leaving property the question that came up for decision before the Bombay High Court, was whether the adoptive father or adoptive mother was the preferential heir. Their Lordships observed that, according to the Mitakshara, when a son dies, leaving his parents as heirs, the mother succeeds to the son's estate before the father. Vijnaneswara puts the preference of mother on two grounds (as West J. observed in Lallubhai v Mankuvarbai)[21]: (a) that the word pitarau is abbreviation of the conjunctive compound matapitarau (parents) in which the word mata comes before Pita (b) that the mother's propinquity was greater than the father's. Their Lordships observed that no doubt propinquity

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20. (1909) I.L.R. 33 Bom. 404, 409; 3 I.C. 745.

21. (1876) I.L.R. 2 Bom. 388 at 439.

does enter the reasoning of Vijnaneswara, but it does not on that account follow that he intended to deny the same propinquity to an adopted son which he allows to a natural born son. This case shows the fallacy of Vijnaneswara's interpretation of the word 'Sapinda'. The correct interpretation of Manu's word 'Sapinda' would probably be with respect to the capacity of a person to offer and receive oblations. Especially in case of a Hindu adoption, it would seem obvious that the adoption is in the first instance for the benefit of the father, and the adoptive mother's affiliation follows as a necessary corollary. It would therefore appear that the adoptive father is a nearer heir than the adoptive mother to the property of the deceased adopted son.

Succession to son adopted in dvyamushyayana form

In Basappa v Gurlingawa[22] it was held that under the Hindu law, on the death of a son adopted in the dvyamashyayana form, his adoptive mother and natural mother inherit equally as co-heiresses, the property left by him. Their Lordships observed that the dvyamushyayana form was only a variety of the dattaka. The right of inheritance is regulated by the theory of propinquity according to the Mitakshara, but the test of offering Pinda is not excluded according to the decisions of the Privy Council in Lallubhai v Cassibhai,[23] Buddha Singh v Laltu Singh[24] and Jotindra Nath Roy v Nagendra

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22. Basappa v Gurlingawa (1933) I.L.R. 57 Bom. 74.

23. (1889) I.L.R. 15 Bom. 110.

24. (1915) I.L.R. 37 All. 604 at p. 613.

Nath Roy,[25] in the last of which it was observed as follows (p. 1416)

> "It is, their Lordships think, a mistake to suppose that the doctrine of spiritual benefit does not enter into the scheme of inheritance propounded in the Mitakshara. No doubt propinquity to blood is the primary test, but the intimate connection between inheritance and funeral oblations is shown by various texts of Manu (see, for instance Chapter IX, verses 136 and 142), and the Viramitrodaya brings in the conferring of spiritual benefit as the measure of propinquity, where the degree of blood relationship furnishes no certain guide".

Their Lordships in Basappa's[22] case referred to Kali Komul v Uma Shunkar,[26] Radha Prasad v Ranee Mani[27] and Dattatraya v Gangabai[28] wherein it was held that the adopted son holds precisely the same position as a son born, except in a few specified instances, and also th Sundaramma v Vênkata Subba Ayyar[29] wherein it was held that there is no authority for the view that in order to become an adoptive mother she should have actively participated in the adoption by actually receiving the boy in adoption. In the present case the Plaintiff took the boy in adoption in the dvyāmushyāyana form and entered into agreement with the natural father that the boy adopted was to be the son of both and it therefore follows that the adoptive mother of the adopted son occupies the position of a mother. This position is supported by a text of Nanda

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25. (1931) 33 Bom. L.R. 1411 at p. 1416.
26. (1883) L.R. 10 I.A. 138; S.C. 10 Cal. 232.
27. (1906) I.L.R. 33 Cal. 947.
28. (1922) I.L.R. 46 Bom. 541.
29. (1926) I.L.R. 49 Mad. 941.

Pandita[30]

> "In consequence of the superiority of the husband, by his mere act of adoption, the filiation of the adopted, as the son of the wife, is complete in the same manner as her property in any other thing accepted by the husband".

The Dattaka Mimamsa lays down as follows:[31]

> "The forefathers of the adoptive mother only are also the maternal grandsires of the sons given, and the rest: for, the rule regarding the paternal, is equally applicable to the maternal grandsires..."

In the case of the simple adopted son severance from the natural family results from the very act of the gift of the boy in adoption.[32]

It was contended on behalf of the adoptive mother that she should be preferred to the natural mother on the ground that the property in suit belonged to the adoptive family, reliance being placed on Sarkar's Hindu law of adoption.[33]

> "The natural mother of the son adopted in the dvyāmushyāyana form can be his heir. But a difficult question arises when such a son dies, after inheriting property from both the adoptive and the natural father, leaving behind him his adoptive and natural mothers. It is reasonable that both the mother's should inherit the respective shares of the property inherited by the son from their respective husbands".

In Behari Lal v Shib Lal[34] it was held that a natural mother of a Hindu adopted into another branch of his family by the nitya dvyāmushyāyana form of adoption does not, on

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30. Datt. Mim. S. 1, pl. 22 (Stokes' Hindu Law p. 536).

31. Datt. Mim. S. 6 pl. 50 - Stokes Hindu Law p. 612.

32. Discussed in Bai Kesharba v Shivsingji [1932] 56 Bom. 619 and Laxmipatirao v Venkatesh (1916) 41 Bom. 315 at pp. 330-331.

33. Second edition p. 383.

34. (1904) I.L.R. 26 All. 472.

account of such adoption lose her right of succession to her son in the absence of nearer heirs. In that case the property belonging to the adoptive family was held to pass to the natural mother in preference to a bandhu i.e. adoptive father's sister's son. Reference was made to Dattaka Chandrikā Sec. 2, pl. 19, where it is laid down that in the case of a simple adopted son extinction of filial relation resulted but in the case of the dvyāmushyāyāna form, the gift is a qualified gift and the dvyāmushyāyana adopted son does not cease to have filial relation with his natural parents. It would therefore follow, observed their Lordships, that the natural mother retains her right of inheritance to the dvyamushyayana adopted son. Commenting on Behari Lal's case,[34] Mayne makes the following observations

> "It was held by the Allahabad High Court that by virtue of the special agreement the relationship of the natural mother was unaffected by the adoption, and therefore her right of succession. If she had died leaving property it follows that Raghunandan might have been her heir. If the adoptive mother had survived him, apparently both mothers would have been co-heiresses".[35]

Adopted son succeeds to Stridhana of adoptive mother

In Teencowree v Denonath[36] and Gangadhar v Hiralal[37] it was held that like an Aurasa son, an adopted son, in the absence of daughters, succeeds to the stridhana of his adoptive mother. In the former case their Lordships held that an adopted son has all the rights and privileges of a

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35. Mayne's Hindu Law, 9th edition para. 167A, p. 231.

36. (1865) 3 W.R. 49.

37. (1916) I.L.R. 43 Cal. 944, 970.

son born, and is also entitled to succeed to the stridhana of his mother in the absence of daughters, in like manner as a son born, whether there be or be not a will in his favour. Also that a son adopted by one wife may succeed to a co-wife's stridhan. In this case the texts quoted in favour of the adopted son's rights were: Sutherland's Duttaka Chandrikā: (Synop., p. 219 or p. 153 of 1834 edition); Dāyakrama-Saṅgraha (p.57, S.5); Dāyabbāga p. 82; Macnaghten's Hindu Law, Vol. I, pp. 39-40 (to show that the adopted son has the same status as the Aurasa son).

Against the argument, the following details were brought to the notice of their Lordships: the case reported at p. 128, Select Reports Vol. III, Gunga Mya's case[38](wherein it was held that the adopted son was not entitled to succeed to the maternal grandfather's estate on the death of the adoptive mother when the estate would go to her father's heirs). This case was held by their Lordships to be inapplicable to the present case as in that case the property descended to the woman from her father as inheritance and not as stridhan - the reason given being that the adopted son is adopted into the adoptive father's family and not into the adoptive mother's family and cannot perform the Sradh of the maternal grandfather (which view has been held to be mistaken by their Lordships of the Allahabad High Court in Sham Kuar's case[39] see p. 384 above) but in the case of stridhan the adoptive son would succeed, in the absence of a will, after the daughter's son like a natural son. Their Lordships further observed that the Hindu law of Inheritance provides also that the son of a contemporary wife is entitled to

38. Gunga Mya v. Kishen Kishore [1821] Select Reports 3 S.D. 170.
39. (1867) I.L.R. 1 All. 255 (F.B.) Sham Kuar v. Gya Din.

succeed to her stridhan.

In Gangadhar v. Hiralal[37], it has been held that the adoptive and natural sons of co-wives succeed equally to their step-mother's stridhan. For a discussion of this case refer to pages 192 - 93

Step-Mother not entitled to succeed to step-son.

In Lala Joti Lal v. Duranikower[40] the question to be considered was, whether, assuming the family to be a divided one, a step-mother can succeed to the estate of her step-son, according to the law prevalent in Mithila. Their Lordships observed that, according to the law as current in Bengal, the step-mother cannot succeed to the estate of her step-son. But it was contended that, according to the Mitakshara, which is the law prevalent in Mithila, a different rule prevails. Their Lordships quoted paragraph 3 of the Mitākharā which states

> "Besides, the father is a common parent to other sons, but the mother is not so; and since her propinquity is consequently greatest, it is fit that she should take the estate in the first instance, conformably with the text as to the nearest Sapinda the inheritance belongs";

and observed that the reason given in the above-cited passage shows that a step-mother is not included in the word "mother".

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40. (1864) W.R. (Sp. NO.) 173 (F.B.).

Strange, in his book on Hindu law page 144, refers to this paragraph as an authority in support of the text "step-mothers, when they exist are excluded".[41] Also other passages of the Mitākṣarā preferring grandmothers to grandfathers for succession to the properties of grandsons show that step-grandmothers could not be included. For the above reasons, their Lordships held that a step-mother cannot take by inheritance from her step-son.

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41. See also Macnaghten's Note, 1 Select Cases, page 39, Note (a), id, 42 note (a).

Adoptive mother succeeds to adopted son in preference to other co-wives

Conversely the adoptive mother and her relations are entitled to inherit to the adopted son.[42] In Annapurni v Forbes[42] it was held that a junior wife who took part in the adoption by her husband at his selection, inherits impartible family estate upon the death of the adopted son, in preference to a co-wife who was senior in marriage, but had not been conjoined in the adoption. In this connection their Lordships referred to the only reported decision involving the proposition in question viz. Kasheeshuree Debia v Greesh Chunder,[43] where the Court had held that on the death of a son adopted by a Hindu as the son of one of his two wives, the property descends, not to the other wife, but to the next legal heir. Their Lordships in Kashishuree's case[43] referred to a passage from Colebrooke's Hindu law Vol. III, p. 100 with reference to the use of the singular Janani to denote natural and matarah the plural of matri to denote step-mothers...

> "Vachaspati Misra expands 'on failure of him', on the death of the father, 'natural mother (janani) she who has a son, mothers (matarah) step-mothers who have no male issue': all these shall have equal shares with the sons".

But this text, observed their Lordships did not apply to the present case i.e., the father did adopt a son for 'M' only and therefore the boy is her adopted son and on her death, his property would go by Hindu law, not to a step mother but to the next legal heir such as a nephew is here. Similarly

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42. Annapurni Nachiar v Forbes (1899) 26 I.A. 246; (1900) I.L.R. 23 Mad. 1 affg. (1895) I.L.R. 18 Mad. 277; Anandi v Hari Suba (1909) 33 Bom. 404; Basappa v Gurulingawa (1933) 57 Bom. 74.

43. Jan-July [1864] W.R. (Sup. Vol.), 71.

the passage's from Strange's Hindu Law (Vol. I, p. 87) and Macnaghten (Vol. II, p. 62) did not assist the appellant's case. As to the two cases cited viz., S.D.A. Select Reports (Vol. II, p. 27, 4 Aug. 1812) rules not (touching this case) that the adopted son of a widow succeeds to her peculiar property and the case of S.D.A. (Rep. 30 July 1859) rules that relatives of adoptive mother inherit property of her adoptive son just as they would have succeeded to the natural born son. But in this case, observed their Lordships, it was not the adoptive mother but the second wife that was the appellant. Next their Lordships in Annapurni v Forbes[42] referred to the texts of Manu and Baudhāyana to the effect that all wives share the good effects of the son of one wife and observed that these texts were not applicable to the present case otherwise the natural mother and the co-wife would stand on an equal footing which is not the case. Their Lordships referred to Sir W. Macnaghten, who, when dealing with the case says the law is silent on the point but holds that the three widows being one and the same individual, the adopted son necessarily holds the same relation to them all, but, observe their Lordships, he does not show by what process he arrived at the conclusion and later makes statements difficult to reconcile with this view i.e., he says, in case the husband had specified the widow to make the adoption, the case would be different. He further cites the opinion of a Pundit that only one widow can adopt.

The child becomes the child of all the three. The widow adopting is called the mother and the others the step-mothers. Their Lordships next refer to West & Buhler's Hindu Law 3rd edition 1181, 1182 and G.C. Sarkar on 'Adoption'

(Tagore law Lectures for 1888, p. 153) who after referring to the Bengal decision of 1864 (i.e. Kasheeshuree Debia v Greesh Chunder[43] do not show any dissatisfaction with that decision but on the contrary state the law in accordance with it.

Manu's text (IX, 183) declares that if of several wives one brings forth a male child, all shall by means of him be mothers of male issue and in the preceding sloka that if among several brothers of whole blood one have a son born they are all made fathers of a male child by means of that son. Their Lordships observe that these texts probably mean that all take the spiritual benefits of male issue but the law is clear that for the purpose of inheritance the natural mother and father respectively are preferred. If a man can authorise one of the several widows after death, their Lordships observe that it would be capricious to deny him the power during his lifetime. Apart from the one judicial decision in favour of the point there is so much reason and opinion in its favour and so little against it. I think the judgment in Annapurni v Forbes[42] is very well reasoned out and I am inclined to agree with the opinion expressed by their Lordships in the case. As observed by their Lordships even in the case of succession to the natural son's property and vice versa the natural mother is preferred to the step-mother and similar should be the position with respect to succession to the adoptive son's property and vice versa. Also, as pointed out by their Lordships, Manu's text (IX, 183) to the effect that if one of the wives has a male issue all the other wives shall by means of him be mothers of male issue, is to be explained with reference to the preceding sloka i.e., that if among

several brothers one has a male issue, they all are made fathers by means of such issue. As correctly observed by their Lordships in Annapurni v Forbes[42] these texts of Manu mean that they share the spiritual benefits of having a male issue but for the purposes of inheritance the ordinary law of inheritance will apply.

The 'Adoptive Mother' in case of plurality of wives

So long as a Hindu adopts while he has but one wife living there is no problem, but what if he adopts having more than one wife living, with one wife living and one dead; with one wife dead or with more than one wife dead? What if he adopts before he marries? In all of these cases will any one be the adoptive mother and if so who? Or will all the wives be adoptive mothers for the purpose of succession. Mr. K.V.V.L. Narasimhachari in his article "Adoptive mother",[44] arrives at the last mentioned conclusion. He argues that Apararka, Brihaspati and Sumantu hold the view that the son of a co-wife is the only competent person to perform the funeral rites of all the wives of the father and says that such a son will not do so unless he gets their property. So, says Mr. Narasimhachari they must be deemed to be mothers not only for spiritual purposes but also for temporal purposes of succession. The author of Suddhiviveka gives the rights of performing the funeral ceremonies of the wives to the husband even when there is a Sapatniputra. According to Narasimhachari this is not tenable. Katyayana also denies the right of the father to perform the obsequies of the wives when there is a co-wife's

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44. [1953] 2 M.L.J. (Journal section) 23 to 27.

son. From these texts Mr. Narasimhachari concludes that the balance of authority is in favour of the right of the co-wife's son to perform the obsequies and not of the father and says that all this points to one conclusion that all the wives of the father are to be deemed the mothers of the adoptee not only for spiritual purposes but also for temporal purposes of succession. Let the natural-born son have only one maternal grandfather, but adoption is a fiction and a fiction is elastic and it cannot be equated to rigid reality, opines Mr. Narsimhachari and asks 'what prevents an adopted son from having more than one mother and thus more than one maternal grandfather'? He says that the answer, viz., difficulties in the law of inheritance is not convincing. Adoptions have been set aside years after their alleged performance. Father's alienations have been challenged by minor sons many years after their occurrence. In the meantime the properties might have changed hands. He further comments that even though these cause difficulties, what if? Legal principles must be followed to their logical end, the invincible logic of the law bears down deverything. Referring next to the text of Sumantu "All the wives of the father are mothers (matarāh)", he opines that this text is applicable only to the case of an adopted son. It is inapplicable to the case of an Aurasa son whose mother is a fait accompli. He says that Sastric injunction is significant only in so far as it lays down something new. In the case of a natural son, the mother is known. No new information is required, hence this text is inapplicable to such a case. In the case of an adopted son, the mother is to be found. The text says that all the wives of the father are mothers. Hence the above text applies to this case.

Narsimbachari further says that the in this text the terms 'Pitṛ' and 'Mātṛ' are used, and not the terms 'Janaka' and 'Janani'. In the Sanskrit language, comments Narsimbachari, the terms Pitṛ and Mātṛ have wider import than the terms Janaka and Janani. Since an adopted son cannot have a natural mother (Janani), but only an adoptive mother (Mātṛ), Sumantu, says Narasimhachari, has used the term Mātarah. 'Thus the term Janani (or the mother that has given birth to) is significantly absent here and the term mātarah is advisedly used'. The author also refers to Vaidikasarvabhauma's Dasanirnaya wherein he also advances a similar argument while discussing the question whether the adopted boy can legally marry a girl of his stepmother's natural father's gotra and concludes that he cannot, because the general term Matr is used even there and not the term Janani, which is of restricted import. Narasimbachari therefore concludes that the textual law points to one conclusion that all the wives of the father are to be deemed the mothers of the adopted boy for spiritual as well as temporal purposes.

The textual authorities are, however, silent on the point. The Dattaka Mīmāṁsā contains two passages bearing on the subject but these passages are not of much assistance in the solution of this problem. At I, 22 a text of the Dattaka Mīmāṁsā reads

> "... for in consequence of the superiority of the husband, by his mere act of adoption, the filiation of the adopted, as son of the wife, is complete in the same manner as her property in any other thing accepted by the husband".

Further at VI, 50 another text of the Dattaka Mīmāṁsā reads

> "In the case of substitute sons commencing with the dattaka their maternal grandfathers are merely the fathers of their respective adopting

> mothers since the reasoning which applied in relation to the father applies also in regard to maternal grandfathers".

Thus it would be appear from a perusal of these texts that when a married man adopts, the adoptee becomes a member of the adopter's wife's family also. But Nandapandita is silent on the point when the adopter has many wives or is unmarried at the time of adoption. Also a text of the Dattaka Chandrikā III, 17 is of no direct assistance on the point. The text states that the dattaka gives Piṇḍas to his adoptive father and mother "The completely adopted dattaka gives piṇḍas only to the father, and son on, of his adopting father".

I do not agree with the view of Mr. Narasimbachari that in the case of adoption by a Hindu having more than one wife, living or dead, all the wives will be adoptive mothers for the purpose of succession. At p. 401-2 above I have given the reasons why the adoptive mother should be preferred to the step mothers for succession to the property of the adopted son and vice versa. The same reasoning would apply to the question under discussion and only one wife can be the adoptive mother, the others being merely step-mothers. As in the case of several brothers, if one has a son, they all are made fathers by means of such issue (Manu IX, 182), the same appears to be the intention of Manu IX, 183 that if one of the wives has a male issue the other wives also become mothers of male issue. As rightly observed in Annapurni v Forbes[42] these texts of Manu only mean that they share the spiritual benefits of having a son and are deemed mothers only for spiritual purposes and not for temporal purposes of succession. The argument of Mr. Narasimbachari that whilst the natural son can have only one mother, this should not prevent an adoptive

son from having more than one mother, since adoption is a fiction, is unconvincing and a falacious argument. For even according to the Sastric law the adoptive son has no superior rights than the natural son. Besides it would be inequitable if the adopted son were allowed to succeed to maternal relations through all the step-mothers when the natural son cannot. Even on equitable grounds the adopted son's position should be the same, if not inferior to the natural son.

Adopted son entitled to succeed to relations of deceased wife of the adoptive father:

In Sundaramma v Venkata,[12] it was held that the adopted son of a Hindu whose only wife had died before the adoption becomes the son of that wife so as to inherit as such to the relations in her father's family. There is no authority for the view that to be an adoptive mother, she should have actively participated in the adoption by actually receiving the boy in adoption. As to the principles which govern adoption under Hindu law their Lordships referred to the case of Uma Sunker v Kali Komul[45] wherein Mitter J. observed

> "The theory of adoption depends upon the principle of complete severance of the child adopted from the family in which he is born both in respect to the paternal and maternal line, and his complete substitution into the adopter's family as if he were born in it".

This theory was upheld by the Privy Council in Nagindas v Bachoo.[46]

The theory is that the adopted son by a legal

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45. (1881) I.L.R. 6 Cal. 257.

46. (1916) I.L.R. 40 Bom. 270, 279 (P.C.).

fiction becomes natural son of adoptive father and presumably also of his wife and that the question is not complicated by the existence of two or more wives. Their Lordships in Sundaramma's case[12] also referred to Narasimha v Parthasarathy[47] wherein their Lordships of the Privy Council observed

> "Only one wife can receive the child in adoption so as to step into the position of being its adoptive mother",

and again

> "to hold that a child could bear such a relationship to more than one mother would be entirely contrary to settled law".

A Hindu son has to offer oblations not only to the father's ancestors but also to his mother's ancestors and it would be straining the legal fiction of adoption too far to hold that the boy need have no mother at all, though the case of a bachelor adopting would be an exceptional case. In the case of co-wives, the wife who joins in adoption was held to be the adoptive mother in preference to the senior wife,[48] which view was upheld by the Privy Council in Annapurni Nachiar v Forbes.[49] Wherever possible a mother should be found for the boy and the fact that such a mother died before the adoption can be no obstacle in view of the fictitious character of the whole principle of adoption. Their Lordships next referred to the contention that even if the adoptive father's wife is alive she does not become the adoptive mother unless she actively participates in the adoption by receiving the adopted boy and observed that this contention was based on the literal

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47. (1914) I.L.R. 37 Mad., 199 at 220 (P.C.).

48. Annapurni Nachiar v Collector of Tinnevelly (1895) I.L.R. 18 Mad. 277.

49. (1900) I.L.R., 23 Mad., 1.

meaning of the word 'Prathigrahiya' meaning literally 'receiving' and it was contended that unless she actually received the boy she did not become the adoptive mother. Their Lordships observed that it was well settled that a Hindu could adopt without the consent of his wife or even against her consent and in either case the adoption was valid. Dattaka Mimamsa (I, 22) reads

> "In consequence of the superiority of the husband by his mere act of adoption, the affiliation of the adoptee, as son of the wife, is complete in the same manner as her property in any other thing accepted by the husband".

In this text there was no qualification of the words 'son of the wife'. As to the contention that it only means a son in a tertiary sense as laid down by Sarkar Sastri in his comments on adoption (at p. 227) i.e. not really a son for any purpose, their Lordships in Sundaramma v Venkata[12] observed that apart from the comment of Sarkar Sastri there appears to be no authority for the proposition that the wife does not become the adoptive mother unless she actually received the boy. Their Lordships further observed that only in very rare cases doest the wife receive the boy and that if this view were accepted the adopted son would have no mother at all. The text of the Dattaka Mīmāṁsā was an authority to the contrary. Their Lordships referred to the article of Sir Bhashyam Ayyangar J. in 9 Madras Law Journal 231 wherein the learned author had accepted this position. If therefore the wife becomes the adoptive mother whether she takes part in the ceremony or not there can be little difficulty in pressing the fiction further so as to include the deceased wife of the adoptive father. The whole theory being a fiction, their Lordships observed that the impossibility of a woman becoming

a mother after death must be explained away by the fictitious nature of adoption. As her consent was not necessary, the fact that consent cannot be obtained after her death was immaterial. Sarkar Sastri interprets Pratigrahītryamāthā at (page 419E) of his Tagore law lectures on adoption," But it should be observed that although the husband's son is deemed by courtesy to be the wife's son, yet acceptance by the wife is absolutely necessary to constitute the husband's adoptee her legal son". At p. 200 para. 4 he expresses a contrary view "When the adopter is a widower, it might be said that his deceased wife's ancestors will be maternal ancestors of the adopted son".

I am inclined to agree with the view that if a Hindu adopts a son, the adopted son also becomes the son of his deceased wife so as to inherit to the relations in her father's family. Although the Smritis are silent on this point, under the Hindu law the identity of the wife with the husband for all spiritual purposes is recognised. Also as the adoptee loses all rights in his natural family, on equitable grounds, he must be given similar rights in the adoptive family. For he becomes a permanent member of his adoptive family as in the case of a natural son and continues the line of his adoptive father. His relationships in the natural family are completely replaced by corresponding new relationships which are acquired in the adoptive family. What he loses in the natural family, he must, on equitable grounds be compensated for in his adoptive family. I therefore support the view that the adopted son is entitled to succeed to maternal relations (including relations of the deceased

wife of a Hindu adopting a son) in the adoptive family.

Living wife preferred as the adoptive mother to the deceased wife

In Thirumaleshwara Bhatta v Kashimutt Ganapayya[50] their Lordships pointed out that it cannot be said that a Hindu has a right to name a non-existent deceased wife in preference to the existing living wife as the mother of the boy adopted by him, so as to entitle him to succeed to the estate of such predeceased wife's father. In this case the lower Court's decision that the adoptive father had no right to name a non-existent wife as the mother of the adopted boy in preference to a living one was attacked by counsel for Thirumaleshwar Bhatta on two lines ... the first line rested upon the decision that a bachelor could adopt;[51] that a widower could adopt[52] and that a man with plurality of wives could adopt even in opposition to their wishes and thus foist a son upon one or more of them.[53] The conclusion was that the husband may adopt to suit himself and filiate the son adopted as he chooses. The second line rested upon the already propounded rule in Sounthara Pandian v Periaveru[54] that a deceased wife may be an adoptive mother, on the rule in

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50 [1952] 2 M.L.J. 716.

51. Gopal Anant v Narayan Ganesh (1888) I.L.R. 12 Bom. 329, see also Nagappa v Subba Sastri (1865) 2 M.H.C.R. 367.

52. Nagappa v Subba Sastri (1865) 2 M.H.C.R. 367, and Sundaramma v Venkatasubba Ayyar (1926) 51 M.L.J. 545; I.L.R. 49 Mad. 941.

53. Annapurni Nachiar v Collector of Tinnevelly (1895) I.L.R. 18 Mad. 277 and Annapurni Nachiar v Forbes (1899) L.R. 26 I.A. 246; I.L.R. 23 Mad. 1 (P.C.).

54. (1933) 65 M.L.J. 58: I.L.R. 56 Mad. 759, (F.B.).

Annapurni Nachiar's cases[53] that if there are two or more living wives the wife associated in the adoption is the adoptive mother, that if several wives are jointly authorised by the husband to adopt it is the senior wife as dharmapatni that is the adoptive mother[55] and that if the two wives are severally authorised the junior may adopt even if the senior wife refuses.[56] From these cases the deduction was that the husband might freely nominate, if he chose, the adoptive mother. Their Lordships were unable to accept the above contentions for the following reasons. Firstly, their Lordships observed that the correctness of Sountharapandian's case[54] had been doubted by very eminent jurists and in fact was the subject matter of a reference to a full bench in A.S. No. 83 of 1947 by Govinda Menon and Basheer Ahmed Sayeed J.J. This matter could not be disposed of by a full bench as the parties compromised. The reference was based on Mayne's Hindu Law 10th edition pages 258 and 259.[57]

The decision was also criticised by Sir M. Venkata-subba Rao.[57] To adopt the words of Lord Truro in Egerton v Brownlow,[58] uttered in another context, the fiction of adoption constitutes "a very unruly horse and when once you get astride of it you never know where it will carry you". The caution enjoined in Subramanian v Somasundaram[59] that "even a fiction cannot be carried to illogical limits" was

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55. Tiruvengalem [illegible] v Butchayya (1927) 55 M.L.J. 757; I.L.R. 52 Mad. 373.

56. Mondakini v Adinath (1890) I.L.R. 18 Cal. 69.

57. Referred to in Sivakami's case subsequently on page 430.

58. [1853] 4 H.L.C. 1: 10 E.R. 359.

59. (1936) I.L.R. 59 Mad. 1064 at 1078.

too wholesome to be ignored. Their Lordships in Thirumaleshwara's[50] case observed that text writers like those of Dattaka Mīmāṁsā should not be taken literally and verbally because in Dattaka Mīmāṁsā, for instance where it is stated about the wife of the adopter becoming the mother of the adopted boy independently of her volition, the writer was only thinking of matters spiritual and in terms of perpetuation of the sacred fire, Shradha etc. 'Otherwise if we do not keep in mind this limitation', observe their Lordships, 'there would be a complete perversion of the laws of inheritance'. In a series of cases it has now been held by the Courts that more than one wife of the adopter cannot become the mother of the boy for purposes of succession. Under Shastras the theory of maternity arising in case of all wives of a person was based upon the spiritual aspect, observed their Lordships. As to the suggestion that both the deceased and the living wives might be mothers, relying upon the text of Manu[60] "all the wives of one man are mothers of sons if one of them has a son", Ramaswami J., saw this text and all references to it in this context as merely referable to spiritual matters, perpetuation of the holy fires, Śrāddha and so on. Commenting on the remarks of Ramaswami J., Derrett[61] remarks that the observation (as to perversion of the laws of inheritance etc.) is much too strong, because the result would be no more absurd than that which then (1955) prevailed in the case of the dvyāmushyāyana son, who undoubtedly inherited from two mothers

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60. Manu (IX, 183).

61. "Hindu law: Adoptive Mothers: Another difficult problem for the Supreme Court" by J.D.M. Derrett [1955] S.C.J. (J) 217.

and two lines of maternal ancestors.[62] In fact there is no absence of authority for the position of multiple affiliation of the dattaka on the maternal sides.

> "The real objection to Thirumaleswara Bhatt's succeeding to the relations of a deceased wife of his adoptive father was not that the claim of that deceased wife to be a mother was merely a spiritual claim unconnected with secular matters, but that there was no power in the father to connect a deceased wife with the adoption for any direct purpose, whether he were married or unmarried at the time of adoption",

observes Prof. Derret[61] (at p. 227).

When the question came up for decision before the Andhra Pradesh High Court in Kancheti Ramakrishnayya v Mandadi Narsayya[63] it was held that it was the right of a father to take a boy in adoption. The mother may be associated with him in the ceremony but her consent was immaterial and according to Sastras no particular place is designated or rites prescribed to her in the ceremony of adoption. If the adoption therefore was to the husband and the husband himself took the boy in adoption during his life-time no question of relating back could conceivably arise. The application of the principle of the converse case, namely, the fiction of a posthumous son in the case of an adoption by a widow after the death of her husband, to a case of adoption by the father himself was incongruous, and would lead to many anomalies. Where a husband died and later his widow took a boy in adoption, fictionally it approximated to the case of a boy conceived during the husband's life-time but born subsequently.

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62. Wooma Daee v Gokoolanund (1877) L.R. 5 I.A. 40: I.L.R. 3 Cal. 587, also Nilmadub Doss v Bishamber Doss (1869) 13 M.I.A. 85; Vehan v Shib (1904) I.L.R. 26 All. 472.

63. [1954] 2 M.L.J. (Andhra) 53: 1956 An W.R. 1120.

If the process was reversed, it would not only lead to grave anomalies but also to unnatural results. The husband cannot even fictionally give birth to a child conceived by the wife during her life-time. This was carrying the fiction to an illogical extent. It would also lead to the position of having two dates for adoption. For succession to the estate of the father, the date of adoption would be the actual date of adoption by the father and for purppses of succession to the estate of the mother the date of her death. The more powerful reason for rejecting the contention was that the Supreme Court in Shrinivas v Narayan[64] in so many terms laid down the limits of the fiction and it was not permissible to extend it. The date of the adoption unlike the case of an adoption by the mother after the death of her husband was the actual date when the adoption took place. In that view the adoption of the Plaintiff did not divest the estate of M.A. which devolved on the first defendant on the date of death of V.

On the further question when a person after the death of his two wives took a boy in adoption, which wife would be the adoptive mother of the adopted son and whether both of them could be considered as adoptive mothers and whether by the rule as to preference of seniority as between the wives the eldest wife or dharmapatni would be the adoptive mother, their Lordships held that it was undoubted right of the husband to take a boy in adoption though the son adopted became the son of the mother. But the husband could select one or other of his wives irrespective of any question of

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64, [1954] 1 M.L.J. 630 (S.C.).

seniority and give her the status of an adoptive mother. This could be done during his lifetime expressly or by necessary implication. By associating the selected wife with him during the adoption ceremony he can show his preference to her. So too he can authorise one or the other of his wives to take a boy in adoption after his life-time. If he gave power to adopt to all his widows, the dharmapatni or eldest of the widows would be designated by the Courts as the adoptive mother on the ground that it must have been the presumed intention of the deceased.

Preferential treatment was not based upon the fact that junior wives cannot exercise religious acts along with the husband but on the fact that the eldest of wives has preferential right to perform the said acts. Their Lordships noted that the eldest of the surviving widows may not be the eldest of the wives for it was conceivable that eldest of the wives might have died either before the death of the husband or before the date of adoption. It was therefore apparent that the rule of preference based on seniority and the senior wife's superior right to take part in religious duties could obviously apply only to widows or wives who were alive. When there was competition between two or more wives or two or more widows, the eldest of them is preferred not on the ground that she is the first wife but on the ground that she is the eldest of competing wives. All the wives are partners and are eligible to take part in religious duties along with the husband but the eldest is preferred to others. The arbitrary rule of preferring dharmapatni or eldest wife irrespective of the fact whether she is alive or not is not supported by Sastras.

It may be mentioned here that Manu advocates mutual fidelity between the husband and wife unto death and in V, 168 says that after the wife's death, having performed her funeral rites, he may again marry and again light the nuptial fire. There was no basis for the argument, that the first wife though dead, being dharmapatni had a preferential right to be the mother of the adoptive boy in competition between her and the surviving wife. The rule of preference cannot be applied to wives, some of them dead and some of them alive or to deceased wives.

Whatever might be said in the case of two wives when the eldest dies, the second wife gets into her place and during her life-time discharges her religious obligations. Their Lordships in Kancheti Ramakrishnayaya v M. Narsayya[63] observed that no question of preferential right to perform religious obligation would arise after the death of the first wife. When therefore a father had not expressed his intention of nominating one or the other of the dead wives, the presumed intention was to treat the second wife as mother of the adopted son.

Quoting extracts from the judgment in Subramaniam v Muthiah Chettiar[65] (wherein Madhavan Nair J. was quoted in Sundaramma v Venkata Subba Ayyar)[12] their Lordships observed

> "It would be seen from the above extracts from the judgments of the two learned judges that the only question they considered was whether the deceased wife of a person would be the mother of the adopted son. After having decided that she would be, the learned judges took it for granted that the adoption would relate back to the date of the death of the wife. They did not appreciate the distinction between the two

65. [1945] 2 M.L.J. 337.

> classes of cases, namely, adoption by a wife to her husband after his death and adoption by the husband after the death of his wife".

In Shrinivas v Narayan[64] the Supreme Court had restated the principle that adoption by the widow relates back to the husband's death but it did not divest the estate of a collateral which had devolved by inheritance prior to his adoption. Their Lordships also referred to the learned article in [1948] 2 M.L.J. 17 (J), by Mr. Venkataraman the subject of the article being the preferential right of one of the wives to take part in religious duties along with her husband. In this article the learned author after considering the texts of Yājñavalkya, Kātyāyana, Viṣhṇu and others summarises as follows:

> "(i) Every wife married in the approved form is ceremonially competent and can take part in acts of dharma;
>
> (ii) When there are many wives of the same class, other things being equal, the senior wife has precedence and is to be associated in acts of religion;
>
> (iii) Where such a wife is dead or becomes disqualified, the next senior wife should be selected, and
>
> (iv) These rules regulate precedence as between living wives".

It would thus be seen, observed their Lordships in K. Ramakrishnayya v M. Narsayya[63] that there is no basis for the arguments that the first wife, though dead, being a dharmapatni has a preferential right to be mother of the adopted boy in competition between her and the surviving wives. This rule cannot be applied to wives some of them dead and some of them alive or to deceased wives.

I am completely in agreement with the view of their Lordships that the living wife of the adopter is to be preferred as the adoptive mother to his deceased wife. This

view is not only sound and equitable but is clearly supported by the various texts of Yājñavalkya, Kātyāyana and Viṣhṇu which are summarised at p. 417 above.

Modern case law on adoption by a widower and by a man having several wives

Does 'relation back' apply to estate of deceased wife of adopter

A perusal of the earlier cases reveals a conflict between Madras and Andhra decisions as to whether an adoption by a widower will have the effect of making the dattaka an heir to the deceased wife as from the time of her death, so that estates that had vested in the meantime on account of her having died without a son will be divested accordingly. Madras had admitted and Andhra had denied this, but after a full bench decision by the Madras High Court in Sivagami Achi v Somasundaram Chettian,[66] Madras also does not admit this now.

In Sundaramma v Venkatasubba Ayyar[12] (see p. 406 et seq. above) a division bench of the Madras High Court held that a deceased wife of the father could be the adoptive mother. Their Lordships referred to the observation of the Privy Council in Narasimha v Parthasarathy[47] (see page 407 above) and Madhavan Nair J. said (at p. 951)

> "To give full effect to the fiction of adoption and to assimilate the fact to an imitation of nature the adopted boy should have a mother... The theory of a 'receiving mother'[67] being discarded, I cannot find any difficulty in holding that the wife of the adoptive father though she was dead at the time of adoption can be considered as the adoptive mother".

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66. [1956] 1 M.L.J.R. 441 (F.B.); A.I.R. [1956] Mad. 323 F.B.

Phillips J. said (at p. 944)

> "Wherever possible, therefore a mother should be found for the boy and the fact that such a mother died before the adoption can be no obstacle in view of the fictitious character of the whole principle of adoption".

According to Derrett[68] the judges were influenced by the text of Śaunaka that a dattaka should be a reflection of an Aurasa son, ignoring the fact that the text has been utilised by commentators only for determining which relations of the adoptive father are incapable of being adopted. Thus the decision, says Prof. Derrett, was, on principle, an innovation and unsupported by authority.

The decision was approved by a Full Bench of the Madras High Court in the case of Sounthara Pandian Ayyangar v Periaveru Thevan[69] wherein it was laid down that the adopted son of a Hindu whose only wife died before adoption could inherit as a son of that wife from her relations in her father's family. Their Lordships observed that it was not disputed that a bachelor could adopt or that a Hindu could adopt without associating his wife. But the argument put forth was that when a bachelor adopts, the adopted son loses rights in both the natural father's and natural mother's family and obtains only in the adoptive father's family and asked why any surprise should be expressed for want of an adoptive mother when the adoption was made by a widower. Further in the case ofaa person having a number of wives but adopting in conjunction

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67. Pratigrahītriya Mātā ... mother who received boy into her hands - according to the judge means in general sense "adoptive" (also see pp. 407-409 above).

68. "Hindu Law: Adoptive Mothers: Another difficult problem for the Supreme Court" by J.D.M. Derrett [1955] June S.C.J. (J) 217.

69. (1933) I.L.R. 56 Mad. 759 (F.B.).

with one of them, it has been decided that only that particular wife was the adoptive mother, the other wives being only step-mothers.[70] Ramesan J. (p. 765) exphasised that the dattaka should be as complete 'as possible substitute for Aurasa son' and 'if there is no difficulty in pointing to an adoptive mother, one ought to do s o unless specifically contradicted by the Sastra'. According to Derrett there is no authority for holding the dead wife as adoptive mother, the problem as the Sastra leaves it is that one or all the living wives are the adoptive mothers. The strongest argument advanced by the appellant's counsel was based on the expression "Pratigrahītṛiya-Mātṛkā" literally "receiving mother" used in Dattaka Mīmāmsā VI, 50 and Dattaka Chandrikā III, 17. D.M. VI, 50 (Setlur's translation) reads as follows

> "The forefathers of the (prathigrahitriya matṛka) adoptive mother only are also the maternal grandsires of sons given and the rest, for the rule regarding the paternal is equally applicable to the maternal grandsires (of adopted son)".

The text of Dattaka Chandrika III, 17 is as follows

> "But the absolutely adopted son presents oblations to the father and the other ancestors of prathigrahitriya matha (literally receiving mother) only".

Their Lordships in Sounthara Pandian's case[69] observed that it was nowhere laid down that the wife of the adopter should actually receive the boy in order to validate the adoption, and that the Dattaka Mīmāmsā I, 22 clearly states that the adoption is complete by the very act of adoption by the husband

> "If the case stands thus, then, the assent of

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70. Annapurni Nachiar v Forbes (1899) I.L.R. 23 Mad. 1 (P.C.).

> the wife is requisite for the husband also; for the purpose would be the same. This, if alleged, is wrong, for in consequence of the superiority of the husband, by his mere act of adoption, the filiation of the adopted as the son of the wife is complete, in the same manner as her property in any other thing accepted by the husband".

Their Lordships further observed that Mayne's Hindu Law, Sec. 150 mentioned texts of Vasiṣtha, Śaunaka and Baudhāyana containing rituals of adoption according to which when an adoption is made by the husband, it is not necessary, to give validity to the adoption, that his wife or any of his wives should be present or should take part in the adoption. In fact, their Lordships maintain, the Dattaka Mīmāṁsā I, 22 would seem to make the matter absolutely clear that the husband could adopt without associating his wife with him in the act or even against her will. If that be so the meaning to be attached to 'prathigrahītriya Mātṛā' in D.M. VI, 50 and D.C. III, 17 is not its literal meaning of 'receiving mother', but 'adoptive mother', and that this would be made clear when, even with reference to an adoption made by a widow to her husband, the husband is spoken of as prathigrahītṛu.[71] It may be noted that the Dattaka Mimamsa does not permit adoption by a widow but similar expressions used in the Dattaka Chandrika which permits adoption by a widow, wherein the husband to whom the adoption is made is called Pratigrahītṛu. According to their Lordships the word Pratigrahitriya matha seemed only to mean "adoptive mother" and not a woman who actually received the boy. Their Lordships observed that no douht Sarkar Sastri in his book on adoption seems to support

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71. Dattaka Mīmāṁsā VI, 49.

the view put forward by the learned advocate General, two other author's Bhattacharyya[72] and Dr. Gooroodass Banerjee[73] hold the opposite view.

The Privy Council decision in Annapurni's case,[42] observed their Lordships, supports the Respondent's contention, wherein Best J. says (at p. 281)

> "The rule enunciated in Dattaka Mimamsa VI, 50 and Dattaka Chandrika III, 17 to the effect that the forefather's of the adoptive mother only are also the maternal grandsires of the sons given differentiates between the adoptive and natural mothers and not between an adoptive mother who actually joins in the ceremony of adoption and her co-wives".

Also Shepherd J. had observed

> "It is only consistent with this theory (of adoption) that the wife of the adoptive father, if there happens to be one should also be deemed the mother of the boy".[74]

Ramesam J.'s dictum in Sounthara Pandian's case[54] "Nor is there any need to rely on any theory of the adoption relating back to Kothai Ammal's lifetime", proceeds upon a misconception, according to Mayne. For the legal fiction of maternity, there must be a wife in existence at the time of the adoption to whom the law can point as the mother. For the adoption is to the husband and not to her. According to Mayne, the passage in Dattaka Mīmāṁsā I, 22[75] is conclusive

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72. Bhattacharya's Hindu Law 2nd edition p. 151 (3rd edn., Vol. I, p. 357).

73. G. Banerjee: Hindu Law of marriage and Stridhana at p. 371 of 3rd edition.

74. Annapurni Nachiar v Collector of Tinnevelly (1895) I.L.R. 18 Mad. 277, 287.

75. See also Venkataraman's article "Theories of Maternal affiliation in adoption" in [1948] 2 M.L.J. (Journal section) 17. See page 417 also.

to show that the acquirer of the property in the son must be a living person. Where a man has two wives and associates one of them in the adoption of a son, that wife is the adoptive mother, the other being only the step-mother.

In Kashishuree Debia v Greesh Chunder[76] where the wife so selected was the second wife of the adopter and the adoptive mother died before the adopted son, it was held that on his death, the eldest widow was not his heir as mother, being only a step-mother and that the succession went to a nephew of the husband. This decision was approved by the Judicial Committee on an appeal from Madras. Their Lordships of the Privy Council observed that a man may authorise a single one of several wives to adopt after his death so that she would on adoption stand in the place of the natural mother. 'If he can do that, it would be very capricious to deny him the power of selecting a single wife to join with him in his lifetime in adopting a boy, with the same effect on her relations with that boy.[77]

In Tiruvengalem v Butchayya[78] the Madras High Court held that where a Hindu died leaving two widows to both of whom he gave a joint authority to adopt, an adoption made by them jointly is not invalid, though the son adopted would in law be the son only of the senior widow who alone has the preferential right to adopt, the junior widow being considered only as his step-mother. Their Lordships referred to a text

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76. Jan.-July [1864] W.R. (Sup. Vol.), 71.

77. Annapurni Nachiar v Forbes (1900) 26 I.A. 246, 253, 23 Mad. 1, 9 affg. (1895) 18 Mad. 277.

78. (1929) I.L.R. 52 Mad. 375.

of Kātyāyana where the first and senior wife is said to be the Dharma pathni i.e. a wife wed for purposes of performing religious rites and duties and the second and succeeding wives are spoken of as merely for the purpose of love or lust. Again, the Chapter treating of vivāha-saṃskāra, it is stated in the commentary that after the sacrificial fire is created along with one wife the wives afterwards taken do not acquire equal rights with the first wife in respect of oblations unless both the wives together again officiate in creating a new sacrificial fire. Their Lordships remarked that in the Shastras are to be found scattered about many texts which give prominence to and recognised the superiority of the first wife or the Dharmapathni. There is also a well established rule that when the husband dies sonless, the funeral ceremony should be performed only by the first and senior wife. Again, as in the making of Dattahomam, only one person can at a time perform the Homam, it cannot be performed by both or on behalf of both simultaneously. Hence also it is deducible that, though both may be present and participate in the performance of the Homam, it is shastrically performed only by the senior and deemed to have been performed only by her.

So also the Allahabad High Court has held in Raja Ram v Joti Prasad[79] that where an authority is given to each of two wives primarily to adopt with the consent of the other, and secondarily if that consent was not received, to adopt even against the will of the other, and where the actual adoption was carried out by only one wife, and the other was present and approved of it, but did not take the same part in

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79. I.L.R. [1943] All. 747.

the ceremony as the other, the authority was not invalid.

Where a man makes an adoption independently of both his wives, though the Madras High Court refused to consider the question as not likely to happen[80] it would seem that the senior wife would be regarded as the adoptive mother. Where a man adopts a son in conjunction with both his wives, the senior wife would in law be the adoptive mother.[81]

In Yamnabai v Jamunabai[81] both the widows were present at the ceremony and it was found that the senior widow had taken part in the ceremony of adoption but the junior widow was not excluded, the Nagpur High Court held the former to be the adoptive mother. It has been held that whether the adoption takes place during the husband's lifetime or after his death only one wife can be deemed to be the adoptive mother,[82] and in Venkatanarasimba v Parthasarthy[83] their Lordships of the Privy Council observed that "to hold that more than one wife can receive a child in adoption would have an effect which their Lordships state, would produce inextricable confusion in the law of inheritance".

With reference to the interpretation put by the judges in Sounthara Pandian's case[69] of 'pratigrahītri' as 'adoptive' in general sense, Prof. Derrett remarks[68] that the word distinctly conveys the idea of actual or constructive

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80. Annapurni Nachiar v Collector of Tinnevelly (1895) I.L.R. 18 Mad., 277, 287.

81. Yamnabai v Jamunabai (1929) I.L.R. Nag. 211.

82. Yamnabai v Jamunabai (1929) Nag. 211, Venkatanarasimba v Parthasarthy (1914) I.L.R. 37 Mad. 199; 23 I.C. 166; (1913) L.R. 41 I.A. 51.

83. Venkatanarasimba v Parthasarthy (1914) I.L.R. 37 Mad. 199; 23 I.C. 166; [1913] L.R. 41 I.A. 51.

acceptance although the wife may benefit spiritually through Pindas offered by the Dattaka which is an entirely different matter. For spiritual benefit taken by the husband from any source is shared by his wife whether living or dead.

The Hindu law of Inheritance (Amendment) Act 1929 when it declares that a sister's son shall not include a son adopted by the sister's husband after her death (Sec. 2 Proviso) seems to proceed on the view that where a man adopts a son after his wife's death, the son adopted would on principle not to be her adopted son, so as to disturb the course of devolution of property from ancestors or collaterals.

In Subramanian Chettiar v Muthiah Chettiar[84] it was held that an adoption by a Hindu widower was valid and the adoption took effect as if the son had been adopted in the life-time of the deceased wife of the adoptive father. The adopted son divested all intermediate estates which had vested before his adoption subsequent to the death of the adoptive mother either by inheritance or by the application as in the present case of the custom of reverter to her parents family of stridhanam property of a NattuKkottai Chetti woman dying childless. An alleged custom that the reverter would exclude a son adopted after the death of the woman was not established in the case. Their Lordships referred to various cases including Sankaralingam v Veluchame[85] wherein it was pointed out that it was a rule of Hindu law that the adoption dated back to the date of death of the father, that there was no reason why an adopted son should be placed in an inferior

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84. [1945] 2 M.L.J. 337; I.L.R. [1945] Mad. 638.

85. [1943] I.L.R. Madras 309, 330 (F.B.).

position to that of the posthumous son, and that such an adoption would divest an estate of inheritance already vested. Their Lordships also referred to Anant v. Shankar[86] wherein the judicial committee following the decision in Amarendra v Sanatan Singh[87] held that a subsequent adoption would vest the property in the adopted son displacing any title based merely on inheritance from the last surviving coparcener. It was contended that the fiction that adoption should be considered to have taken place in the lifetime of the adoptive father should be confined to only adoptions by a Hindu widow after her husband's death and not to cases of adoption by a widower so as to make the adopted son the son of his deceased wife. Their Lordships observed that it was true that there were no authorities on this point, but that was no reason why this distinction should be made. Adoption itself was a fiction and fictions play a large part in the law of adoption. Their Lordships referred to Sundaramma v. Venkatasubba Ayyar[88] where Phillips J. made the observation quoted at p. 419 above. Madhavan Nair J. in the same case observed at p. 951:

> "As his adoption puts the adopted son in the place of a legitimate son as regards the rights of inheritance in the family of the adopter he must be considered to be the heir to any rights arising after the adoption from his father's wife's position in his adoptive family, though

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86. [1943] 2 M.L.J. 599 (P.C.).

87 (1933) I.L.R. 12 Patna 642 (P.C.).

88. (1926) 51 M.L.J. 545: (1926) I.L.R. 49 Mad. 941.

> she was not alive at the time of the adoption. To Give full effect to the fiction of adoption and to assimilate the fact to an imitation of nature the adopted boy, should have a mother. I do not think it is impossible to conceive the deceased wife as the fictional mother of the adopted child".

View that the deceased wife cannot be the adoptive mother

In Sivagami-Achi v Somasundaram[89] a full bench of the Madras High Court held that an adoption by a widower could not make his deceased wife, even by fiction, the mother of the adopted boy, thus over-ruling Sountharapandian's case.[69] Their Lordships of the Madras High Court observed that according to Hindu law in the case of an adoption by a widow there was no doubt that the adopted son should be deemed to have come into existence on the death of the husband. But where the adoption was by a widower such an act would take effect only from the date of the adoption. Their Lordships observed that an adoption was admittedly to the husband for the salvation of his soul and not to the wife and there was no reason or principle why it should date back to an earlier date such as the death of his wife. Where a widower adopts, the adopted boy can have no maternal relations as nothing of the deceased wife survives in her husband and the fiction of an adoptive mother was a misnomer. Further the Hindu law texts on the subject contemplated only a living wife who could be deemed to be, by a fiction, the adoptive mother of the boy adopted by her husband when she was alive, whether or not she consented to the adoption. For the legal fiction of maternity there must be a wife in existence at the time of the adoption

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89. [1956] 1 M.L.J.R. 441 (F.B.).

to whom the law can point as the mother. According to their Lordships the term 'Pratigrahītṛi Ya Mātṛā' in S. VI, 50 of Dattaka Mīmāṁsā, means a 'receiving mother', and not 'adoptive mother'. The term adoptive mother must be taken in its primary meaning of the mother who accepts a boy in adoption and not in the figurative sense of the adopter's wife, when the adoption is made by a widower. A person can be the mother of the adoptee boy when she is in existence as a wife at the date of the adoption whether or not she consents to it and the term 'Pratigrahītṛi Ya Mātṛā', observed their Lordships, would refer only to a living wife and not a predeceased wife. Their Lordships remarked that the decision in Sounthrapandian's case[69] was not correct. An adoption by a widower could not therefore make his deceased wife, even by a fiction the mother of the adopted boy. Affiliation of an adopted son to a dead wife, remarked their Lordships, has never been in the contemplation of any of the authoritative text writers, and the reasoning that a mother should somehow be found for the adopted boy was unsound.

Their Lordships also observed that it was not open to a widower whose two wives already died to adopt a boy and nominate or designate the deceased second wife as the adoptive mother. Nor can such an adopted son divest the heirs of his 'adoptive mother' who have already succeeded to the estate before his adoption took place, of her share of the property. Their Lordships doubted the correctness of the decision in Ram Krishnayya v Narsayya[83] and Subramaniam v Muthiah Chettair[84] as not correctly decided. During the course of his judgment Ramaswami J., referred to the view in Mayne's Hindu Law (10th edition p. 258 and 259) where Mayne refers to Dattaka Mīmāṁsā

'In consequence of the superiority of the husband, by his mere act of adoption, the filiation of the adopted as son of the wife is complete in the same manner as her property, in any other thing accepted by the husband', and observed that this passage was conclusive to show that the acquirer of the property in the son must be a living person and that the Dattaka Mimamsa contemplates a living wife and not a dead one. His Lordship also referred to the opinion of two eminent jurists viz. Late Mr. S. Srinivas Ayyangar and Sir M. Venkatasubba Rao who were of the opinion that Sountharapandian's case[69] was not correctly decided. Sir M. Venkatasubba Rao, a retired judge of the Madras High Court reviewing Mayne's Hindu Law 10th edition observed as follows.

> "By way of refreshing contrast, the criticism of the full bench decision in Sountharapandian Ayyangar v Periaveru Thevan,[69] is liberal in outlook. That the adopted son of a widower becomes the son of his deceased wife is a rule that outrages both reason and natural feeling. To suppose that the deceased wife is alive or to relate back the adoption to the moment of her death, as the editor rightly points out, is to impose a fiction upon a fiction. The absurdity of invoking the fiction of the maternity in the case of a bachelor who first adopts and then marries is patent".

One of the important reasons for doubting the correctness of Sountharapandiyan's case,[69] observed His Lordship, was the interpretation placed on the term 'Pratigrahītri-Ya Mātha" which, if construed as receiving mother would entail serious reconsideration of the conclusion in the decision. In this connection his Lordship referred to the views of G.S. Sastri (expressed in his book on Hindu law 5th edition IV, page 170) and of the learned advocate Mr. V.V. Srinivas Ayyangar according to whom, even if a person has only one wife living, his taking in adoption without her participation in the actual

act of receiving will not constitute her the adoptive mother. The case was referred to the full bench for decision on the following points: (1) Was the decision in Sountharapandian's case[69] correct. (2) If the answer to that question was in the affirmative, was it open to a widower whose two wives had already died to adopt a boy and nominate or designate the deceased second wife as the adoptive mother. (3) If the answer to the second question was also in the affirmative, can such an adopted son divest the heirs of his adoptive mother who had already succeeded to the estate before his adoption took place, of her share of the property? In other words was Subramaniam v Muthia Chettiar[84] correctly decided?

The opinion of the full bench was delivered by Govind Menon J. His Lordship observed that in determining the correctness or otherwise of Sountharapandian's case,[69] the first thing to see was how far the basic texts of Hindu Law on adoption by a widower had been founded have been correctly interpreted. His Lordship quoted passages from Dattaka Mīmāmsā I - 22 and VI - 49 and 50 and Dattaka Chandrikā III - 17 which is translated as follows:

> "This being so, if now the question is raised whether inthis matter the husband is in need of the wife's permission, the answer is, no. For, on account of the husband's superior importance by the very fact of his taking a boy in adoption, sonship in him (the boy) is achieved by the wife also, just as in any other thing taken by the husband, ownership is secured in the wife too. In the sense that he does obsequies to the branch (line) of his own adoptive father he is spoken of as swasaaka, adherer to his own branch (line). Because this is so it follows that he is to do obsequies only to his own adoptive father's line. Also because maternal ancestors of the adopted son means only the father, grandfather and so on of the adoptive mother because of the applicability of the rule about ancestors to the line of the mother also".

In the case of a person (as for a person) given away in adoption according to prescripts, there is the duty of offering oblations only to the manes of the receiving (adoptive) mother(s father and other ancestors". Their Lordships further observed that it was nowhere stated that there can be an adoption to a woman as the object of adoption was to save the soul of the father from the hell called 'Put ', whilst in the case of a woman, if she conforms to the strict rules ordained by the Sastra and leads a true life, would enable her to attain heaven. As to the meaning of the expression 'Prathigrahīthri ya Mātha' their Lordships referred to various authorities on the subject Bhattacharyya's Hindu Law Vol. I (3rd edition p. 357) and R.N. Sarkar's Hindu law (8th edition Ch. IV, S. III, p. 205) wherein the learned author states that 'Prathigrahīthri ya Mātha' means the wife who accepts in adoption. So also Golap Chandra Sarkar in his Hindu Law of Adoption (2nd edition at p. 199) has not accepted the view that in case of adoption by a widower, the deceased wife's ancestors will be ancestors of the adopted son. Their Lordships also referred to Mayne's Hindu Law (10th edition p. 258 and p. 259) for the view that the Dattaka Mimamsa contemplates a living wife and not a dead one, and also the opinion of Sir Venkatasubba Rao, referred to above at page 398. to the same effect. As to the meaning of the expression 'Prathigrahīthrī ya Mātha', their Lordships remarked that the literal meaning is receiving mother, but almost all the commentators and text writers have interpreted the expression to mean adoptive mother. Their Lordship observed that if seemed to them there was very little difficulty even if the word was to be understood as adoptive mother. Reading Section

I, 22 and VI, 50 of Dattaka Mīmāṁsā, it will be seen, remarked their Lordships, that there was never in the contemplation of the authors to bring in a deceased wife in the matter of adoption by a widower. Further it is not necessary in the case of a woman to have the fiction of an adopted son for her salvation. Their Lordships referred to Annapurni Nachier v Collector of Tinnevelly,[74] which was confirmed by the Judicial Committee in Annapurni Nachiar v Forbes[77] wherein the meaning of I, 22 and VI, 50 in Dattaka Mīmāṁsā and III, 17 in Dattaka Chandrikā was considered. The view in these cases was that 'Prathigrahīthrī' translated as 'adoptive' was intended to refer to a living wife and not to a deceased one. The Privy Council in confirming the judgment of the High Court made no reference to the meaning attributed to the expression prathigrahīthrī but seemed to have taken for granted that it should apply only to a living or sentient being and not by fiction to one who is no more.

Their Lordships referred to an anonymous article (which seems to have been written by a very eminent lawyer who later became judge of the Madras High Court) in [1899] 9 M.L.J. of (J) portion. At p. 233 the following passage occurs

> "The only rational principle is that though a son may be adopted to a deceased male even long after his death by his widow under proper authority, yet there is no such thing as an adoption to a female either during her lifetime or after death. She may become mother by fiction at the time of the adoption to her husband but no female could become the mother of a son adopted by or to her husband after her death nor could a female become the mother of a son adopted by her husband before her marriage. No wife could become the mother of a son adopted by or to her husband either subsequent to her death or prior to her marriage and among the wives existing at the time of the adoption only one of them could become his mother".

While discussing the meaning of the expression 'Prathigrahithri' (at p. 234 in the above referred article in (1899) 9 M.L.J.) the adoptive mother is not referred to as wife of the adoptive father but as the mother who receives the boy in adoption and it is her ancestors only that form the line of maternal ancestry to the adoptive son. Their Lordships observed that Ramesam J. in Sountharapandiyan's case[69] relied upon the basic principle enunciated in Sundaramma v Venkatasubba Ayyar[12] that every adopted son should have an adoptive father and an adoptive mother; that being the case if the adoptive father's wife is dead she should be deemed to be the adoptive mother, and thus translating 'prathigrahithri Ya Matha' in Dattaka Mimamsa Section 6, V, 50 as "adoptive mother". It may be observed, remarked their Lordships, that in view of the context in which the word was used it might mean adoptive mother. But their Lordships opined that the learned judge had failed to note that the Dattaka Mimamsa nowhere contemplates any succession to the deceased wife of the adoptive father. The question for consideration was whether the adoption by a widower could have any such retrospective effect. Their Lordships observed that in the case of adoption by a widow there was no doubt that the adopted son should be deemed to have come into existence on the death of the husband, but where the adoption was by a widower it was now well settled that such an act would take effect only from the date of the adoption. Further the decision in Veeranna v Sayamma[90] and Herek Chand v Bijoy Chand[91] were not taken note

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90. (1929) 56 M.L.J. 401: I.L.R. 52 Mad. 398.

91. (1905) 2 C.L.J. 87.

of by the learned judge in the Full Bench case. Their Lordships also observed that the reason that a mother should be somehow found for the adopted boy was unsound as in the case of adoption by a bachelor who subsequently marries; if he marries more than one wife the question will be who is to be the adoptive mother. Their Lordships had no hesitation in holding that since the texts did not contemplate a deceased wife as a receiving mother either literally or by fiction the expression 'prathigrahithri Ya Mātha' could refer only to a living wife.

In Ramakrishnayya v Narsayya[92] the learned Chief Justice Subba Rao of Andhra High Court on an examination of the authorities was not inclined to agree with the correctness of the decision in Sountharapandian's case[69] and therefore he held, following the decision of the Supreme Court in Shrinivas v Narayan[93] that there was no question of divesting succession to collaterals. The other question decided by the learned Chief Justice was who would be the adoptive mother of a boy taken in adoption by a widower whose two wives had died before the adoption and the opinion expressed was that the second wife who was married after the death of the first wife should be deemed to be the adoptive mother. In the case of Thirumaleshwara Bhatt v Ganpayya[50] (discussed above at p.410), Chandra Reddi and Ramaswami J.J. doubted the correctness of Sountharapandian's case.[69]

Their Lordships, constituting the full bench of the Madras High Court in Sivagami Achi v Somasundaram[89] therefore

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92. [1954] 2 M.L.J. (Andhra) 53.

93. [1954] 1 M.L.J. 630 (S.C.).

arrived at the conclusion that their answer to the first question was that Sountharapandian's case[69] was not correctly decided and in view of that the answer to the second and third questions was negative also.

The position under the Hindu Adoptions and Maintenance Act 1956

Section 14 of the Hindu Adoptions and Maintenance Act 1956 lays down the rules for determining who will be the adoptive mother in certain cases. If a Hindu having a wife living adopts a child, the wife will be deemed to be the adoptive mother, but where he has more than one wife and adopts the child with their consent, the senior wife will be the adoptive mother and others would be step-mothers. Where a widower or a bachelor adopts a child, any wife whom he subsequently marries will be deemed to be the step-mother of the adopted child. Similarly where a widow or unmarried woman adopts a child any husband whom she subsequently marries will be deemed to be the step-father of the adopted child. The section is not exhaustive and provides for determination of adoptive mother and father only in certain cases. In view of Section 12 which lays down that the adopted child will be considered as child of his or her adoptive parents for all purposes and all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family, where a widow adopts, her deceased husband would become the adoptive father of the child.[94] On the question where a widower adopts

94. Sawan Ram v Kalawanti, A.I.R. 1967 S.C. 1761. Sitabai v Ramchandra A.I.R. 1970 S.C. 343.

whether
a child/his deceased wife would become the adoptive mother of the child, as shown in the discussion above, in the earlier adoption by a widower
cases Madras had admitted and Andhra denied that/after the death of the widower's wife will have the effect of making the dattaka an heir to the deceased wife as from the time of her death, so that estates that had vested in the meantime on account of her having died without a son will be divested accordingly. But now after the full bench decision in Sivakami Achi v Somasundaram[89] the Madras view is in agreement with the Andhra view that adoption by a widower does not make his deceased wife the mother of the adopted boy.

On this controversial and difficult question the Smritis are silent. One of the possible reasons may be that in the case of a man the Smritis clearly allow him to take to a new wife after the death of his former wife (Manu V, 168). But the question arises when the widower does not wish to marry again and adopts a son.

According to the Smritis the marriage tie is not terminated even on the death of the parties but as stated by Manu at V, 156, a faithful wife may dwell with her husband even after death. As Manu says "a woman is half her husband and completes him" (IX, 96). Manu (IX, 137) and Yajnavalkya (I, 78) lay down that for the continuity of the family in this world and the attainment of heaven in the next one must have sons, grandsons etc. (which presumably includes the adopted sons, grandsons etc.). These verses read with Manu V, 156 show the close affinity between the man, his wife (whether living or dead) and the son (natural or adopted).

In the case of an adoption by a widow, on the question whether the adoption relates back to the death of

her deceased husband, the Smritis are silent but the courts have held on grounds on equity and justice that such adoption does 'relate back' to the death of the deceased husband of such widow for purposes of succession to his property. In view of the identity of the husband and wife under the Hindu law there appears no reason why the deceased wife of a widower who does not remarry should not be regarded as the adoptive mother. But in such cases on equitable grounds, the adopted son should be entitled to succeed to the property of the deceased adoptive mother and her relatives as it stands on the date of his adoption ie; there appears to be no justification to extend the principle of relation back of such adopted son to the death of the deceased wife of the widower and the rights acquired by any persons between the date of such death and adoption should not be disturbed. If the right to succeed to his deceased adoptive mother and her relations is disallowed to the adopted son then on equitable grounds he should have the right to inherit to his natural mother and her relations which obviously the Hindu law does not sanction. Hence the only solution of this problem appears to be that he should be allowed rights of inheritance to his deceased adoptive mother and her relations, but subject to the condition that he takes the property as it stands at the date of his adoption.

In the case of adoption by divorced persons, the Act is silent. But the position would be the same as that regarding unmarried persons. As stated by Derrett the word 'unmarried' strictly includes 'divorced'.[95] So also the husband who has

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95. Derrett: Introduction to Modern Hindu Law, p. 119 (1963 edition).

renounced the world or has been declared to be of unsound mind, will be considered to be the adoptive father when the wife exercises the right to adopt a child. Where, however the husband has ceased to be a Hindu, the child will be entitled to be his heir, only if the new religion recognises an adopted child as heir. The Muslim law [96] or the Indian Succession Act [97] applicable to Christians etc. do not recognise such an adopted child as heir. As to the position of a child adopted by a Hindu married under the Special Marriage Act, devolution of whose estate would be governed by the provisions of the Indian Succession Act, 1925, although this Act is silent on the question of succession by adopted children, there seems no reason why, on equitable grounds, the adopted son should not be allowed to succeed and have the same rights as a natural son, as provided under S.12 of the Hindu Adoption and Maintenance Act 1956.

English Law on the subject

The English law on the subject has already been discussed above in Chapter V. Section 16 (2) of the Adoption Act 1958 (corresponding to S.13 of the 1950 Act) clearly lays down that in any disposition of real or personal property made whether by instrument inter vivos or by will, any reference express or implied to the child or children of the adopter, shall be construed as, or as including, a reference to the adopted person and a reference to a person related to the adopted person in any degree shall be construed as a reference to the person who would be related to him in that degree if he were the adopter's child born in lawful wedlock and not the child of any other person, unless the contrary intention appears. But as Section 17 points out it is

96. Muhammad Umar Khan v Muhammad Niaz-ud-din /1911/ 39 I.A.19.

97. Makhin Tahn v Ma Ahma /1934/ R.72.

necessary that in case of succession to the property of a woman or her relatives the adoption should have been made by the woman or she must have participated in a joint adoption with her husband.[98]

Also as would be seen from a perusal of the provisions of S. 17, the law of inheritance also covers other relationships created by the adoption. For instance the will of a grandfather or uncle by adoption referring simply to "my grandchildren" or "my nephew and nieces" includes adopted children. As already discussed in the various cases earlier e.g. in Re Gilpin, Hutchinson v Gilpin;[99] Re Fletcher, Barclays Bank Ltd. v Ewing;[100] in Re Marshall, Barclays Bank Ltd. v Marshall,[101] it will be seen that the right of the adopted child to succeed inter vivos or by testamentary succession to the property of his adoptive mother's relations is recognised by the English law provided the adoption was made by the woman either by herself or jointly with her husband.

However, unlike the Hindu law an adopted child will not be entitled to succeed to the property of his adoptive father's wife or her relations if the latter did not participate jointly in the adoption made by her husband i.e. if the

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98. As to adoption by two spouses see also S. 1(2) of Adoption Act 1958 S 1(2) lays down "An adoption order may be made on application of two spouses authorizing them jointly to adopt an infant; but an adoption order shall not in any other case be made authorizing more than one person to adopt an infant". S. 1(3) "An adoption order may be made authorizing the adoption of an infant by the mother or father of the infant, either alone or jointly with his or her spouse."

99. [1953] 2 All. E.R. 1218.

100. [1949] 1 All. E.R. 732.

101. [1957] 3 All. E.R. 172.

adoption was made by the husband alone even during the period of coverture. As such it follows that, again unlike the Hindu law, the question of a child adopted by a man succeeding to his deceased wife or to her relations does not arise.

CHAPTER VIII

THE RIGHT OF THE ADOPTIVE PARENTS TO DISPOSE OF THEIR PROPERTIES AND THE VALIDITY OF ANTE-ADOPTION AGREEMENTS

Sastric law and law prior to Hindu Adoptions and Maintenance Act 1956

View that adoptions for payment of price were invalid

The question of an affiliation which does not automatically give all the right of a natural-born legitimate child is often evoked by adoptions which are parts of bargains, and we must look into the question of what bargains are valid and what effects valid bargains may have. Under the Hindu law a valid gift is one which is made by a person of sound mind and is not liable to resumption. And under this class the following seven kinds are included by Nārada

> "What is given as the price of goods sold or as remuneration (to an artizan or the like) or for the pleasure (of hearing bards, musicians or the like) or out of affection (to a daughter or son), or in return for a benefit, or for the purpose of the bride price or for the purpose of spiritual benefit".[1]

According to Mr. Sastri, a gift of a child, in return for any benefit received from the adopter, therefore is not contrary to Hindu law, and cannot be supposed to be equivalent to a sale.[2] Kapur[3] criticizes this view as incorrect and remarks

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1. Nārada - Smṛiti, fourth topic of litigation, verse 8; Mitākshara on Yājñavalkya II, 176.

2. G.S. Śastri's Hindu law of adoption (1916 edn.), p. 375; Murugappa v Nagappa (1906) I.L.R. 29 Mad. 161 relied on.

3. The law of Adoption in India and Burma: J.L. Kapur p. 502 (1933 edition).

that such adoptions would be invalid because they would really be adoptions in the Krita form which are not allowed in the present age, the Kali Yuga.[4] According to Mr. Kapur[3] the term gift as used in connection with a dattaka adoption is not the same as is signified by what is termed a 'valid gift' but it implies a relinquishment of a right without consideration, and quotes the following passage from the Mitākshara in support of his point of view "Gift consists in the relinquishment (without consideration) of one's own right (in property) and the creation of the right of another".[5] This view is supported by a case reported as Eshan Kishore v Harish Chunder.[6] In this case it was held that the adoption of a son after payment of price is not recognised in the present (or Kali) Yuga, the only adoption now recognised being that of a dattaka or a son given. A contract as to such an adoption could not be enforced, for it would come within the meaning of Act IX of 1872, S. 23 as immoral and contrary to public policy. Their Lordships observed that in former days before the present Kali-Yuga, there were twelve descriptions of sons and the eighth description was the son adopted after payment of a price. Such an adoption is not recognised in the present Yuga, the Kali Yuga, the only adoption now recognised being that of the Dattak son or the son given who alone can take the place of the Aurasa son. The son given i.e. the dattaka son is defined in the Dattaka Chandrikā as follows "He is

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4. Eshan v Harish (1874) 21 W.R. 381, 382.

5. Mit. III, Ss. 5, 6; 2 W. Macnaghten 212 and 219, Mulla: Hindu Law Ss 357-8 at pp. 421 and 424 (1932 Edition).

6. (1874) 21 W.R. 381, 382.

called a son given whom his father or mother affectionately gives as a son, being alike",[7] alike being explained to mean, of the same class. Their Lordships observed that it could not be said, if the contract in the case were carriedout, that the boy had been affectionately given, as a gift implies an act without consideration. Their Lordships also thought that the principle of S. 23 of Act IX of 1872 (The Indian Contract Act) was applicable to this case, as this contract if it were capable of being carried on and were recognised by the Court would therefore involve an injury to the person and property of the adopted son; and again, such a contract, if permitted would defeat the provisions of Hindu Law and that is one of the restrictions laid down in S. 23 Act IX of 1872. In that section it is enacted that the consideration or object of an agreement is lawful, unless it is forbidden by law or is of such a nature that "if permitted it would defeat the provisions of any law". It was very clear in this case, observe their Lordships, that if the Court were to recognise a contract of this description, it would be defeating the provisions of Hindu law.

In Jogesh Chandra v Nrityakali Debi[8] where it was alleged that the boy who was to be adopted was really bought for Rs 700/- the view of the Calcutta High Court was that such a circumstance would invalidate the adoption although they held that he was not so bought.

In Krishnayya v Raja of Pittapuram,[9] Kumaraswami

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7. Section 1, para. 12.

8. (1903) I.L.R. 30 Cal. 965, 969.

9. (1928) I.L.R. 51 Mad. 893.

Sastri J., (delivering a dissenting judgment) observed that where an adoption is made by a widow both in fulfilment of her religious duties and also for getting a gain for herself, the adoption would be valid but the agreement for her personal benefit, if not within limits allowed by law, will be void. A reversioner cannot withhold his consent from corrupt or improper motives. What he has to see is the interest of the family to which the adoption is made. The reversioner's refusal in this case being based on considerations of personal benefit was improper and could be ignored. However Odgers J. and Jackson J. giving the majority decision of the Court disagreed and setting aside the adoption held (i) that on the facts the agreement to execute the settlement and the maintenance deed was a condition precedent to the making of the adoption. (2) that the motive of the widow in making the adoption was corrupt. (3) that the Plaintiff was entitled to refuse his consent on that ground and on the ground that she capriciously wanted to deprive him of his reversionary right. (4) that the Court could scan (a) whether the widow in making the adoption was actuated by proper or corrupt motives and (b) whether the reversioner's refusal to consent was proper or was based upon purely personal grounds. I am however inclined to agree with the dissenting judgment of Kumaraswami Sastri J. in view of the fact that by making the adoption the widow was serving the primary object of adoption viz. conferring of spiritual as well as temporal benefits (in the form of continuation of family name etc.) on the family. The giving or receiving of a benefit is clearly a separable transaction, the invalidity of which should not affect the validity of the adoption itself.

Receipt of benefits by the widow do not render adoptions invalid

In the case of Vellanki v Venkata Rama[10] their Lordships of the Privy Council observed as follows:

> "Their Lordships thought it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow, and that all which this committee in a former case[11] intended to lay down was, that there should be such proof of assent on the part of the Sapindas as should be sufficient to support the inference that the adoption was made by the widow; not from capricious or corrupt motives, in order to defeat the interest of this or that Sapinda, but upon a fair consideration by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband ... there seems to be every reason to suppose that in the present case it must be presumed that she acted from the proper motives which ought to actuate a Hindu female, and that, at all events, such presumption should be made until contrary is shown".

In Mahableshwar v Durgabai,[12] with reference to the above mentioned observations of the Privy Council in Vellanki v Venkata Rama,[10] their Lordships of the Bombay High Court referred to Mayne's opinion (Hindu Law Pl. 116), wherein the learned author commenting on this passage thought that it was not quite clear whether their Lordships of the Privy Council were of the opinion that a widow's motives in making an adoption, provided she has received the assent of the sapindas given bonafide to the adoption, are material. His view, however, is, that the Judicial Committee did not mean to lay down that such evidence would be material or admissible. To us, say their Lordships in Mahableshwar v Durgabai,[12] it

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10. (1876) L.R. 4 I.A., 1.

11. I.e. the Ramnad case (1868) 12 Moo I.A. 397.

12. (1898) I.L.R. 22 Bom. 199.

appears that their Lordships feelings that how dangerous it would be to introduce into consideration of cases of adoption nice questions as to particular motives operating on the mind of the widow, have pointed out that the Ramnad case[11] did not decide that such motives would be material and have not themselves expressed any opinion upon the question. Their guarded language at the end of the above quoted passage leaves the question absolutely open.

In Vithoba v Bapu,[13] which was a case of an undivided family, it was almost admitted that the widow's motives in adopting were malicious, but as she had without deceit obtained the consent of the head of the family to the adoption, the adoption was upheld.

Patel Vandravan v Patel Manilal[14] was the case of a divided estate vested in the widow and where it was alleged that the widow's motives in making the adoption were corrupt and capricious. Sargent C.J. after referring to Ramnad case[11] and the later Privy Council case[10] and adopting Mayne's view said

> "Where however, the assent of Sapindas is not required, as in this Presidency where the family is divided, then there will be only the ordinary presumption that the widow has performed a duty from proper motives, and the onus lies heavily on him who seeks to set aside the adoption on the ground of corrupt motive".

The judgment in Patel Vandravan v Patel Manilal[14] establishes that the fact of the motives being of a mixed character is not sufficient to rebut the presumption. It appears also to be clear that the widow's making terms for herself with the

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13. (1891) I.L.R. 15 Bom. 110.

14. (1891) I.L.R. 15 Bom. 565.

father of the boy to be adopted or selecting a boy whose father will be likely to accede to her wishes is not sufficient to render the adoption fraudulent or to establish that it has been made for a corrupt purpose or for a purpose foreign to the real object of adoption as laid down in Bhasba Rabidat v Indar Kunwar[15] and Chitko v Janaki.[16] In Mahableshwar v Durgabai[12] where a widow had adopted a son and it was found by the Courts that unless she had been assured by the father and guardian of the adopted boy that she would receive Rs 4000, she would not have adopted him, but it was not found that she had not the special benefit of her husband in view when she made the adoption, it was held that the presumption that she made the adoption from motives of duty was not rebutted, and that the presumption should be allowed to prevail.

In Bhasba Rabidat v Indar Kunwar[15] the adoption was questioned on the ground that the widow had agreed with the natural father of the adopted son, that she should retain the whole estate during her life. Their Lordships of the Privy Council were of the opinion that this did not render the adoption conditional and did not affect the rights of the adopted son. Their Lordships stated that even if it amounted to a condition on which the adoption was made, the analogy, such as it was, presented by the equities relating to powers of appointment under English law, suggested that the condition

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15. Bhasba Rabidat v Indar Kunwar (1889) I.L.R. 16 Cal. 556 (P.C.) followed in Murugappa v Nagappa (1906) I.L.R. 29 Mad. 161; referred to in Mahabaleshwar v Durgabai (1898) I.L.R. 22 Bom. 199; Challa Subbiah v Pattabhiramayya (1908) I.L.R. 31 Mad. 446.

16. (1874) 11 Bom. H.C. Rep. 199.

itself would have been void, without invalidating the adoption. It was argued that the adoption was a fraud upon the authority to adopt, and therefore void. This point seemed to their Lordships untenable. They remarked -

> "The conduct of the senior widow is not altogether to be commended, but it would be extravagant to describe it as fraudulent, or to maintain that the adoption was not made for a correct purpose, or for a purpose foreign to the real object for which the authority to adopt was conferred ... The ceremonies of adoption are unimpeached. The deed of adoption is open to no objection. The second deed is, admittedly inoperative. No conditions therefore were attached to the adoption. Had it been otherwise, the analogy such as it is, presented by the doctrines of Courts of Equity in this country relating to the execution of powers of appointment to which Mr. Arathoon appealed would rather suggest that, even in that case, the adoption would have been valid and the condition void".

In Murugappa v Nagappa,[15] the Madras High Court was of the opinion that the transaction of giving and taking was quite distinct from that of the agreement to pay. In this case it was held that when a boy, being a fit subject for adoption in the Dattaka form is given and accepted, with the proper ceremonies for such adoption by persons respectively competent to give and accept him, he acquires the status of an adopted son. The receipt of money by the natural father in consideration of giving his son and the payment of such by the adoptive father, though illegal and opposed to public policy, do not make the adoption invalid, as the gift and acceptance of the boy was a distinct transaction clearly separable from the illegal agreement and payment. Such payment has not the effect of converting the adoption into an 'affiliation by sale', a form now obsolete. The Privy Council decision in Bhasba Rabidat Singh v Indar Kunwar[15] was followed. Subramania Aiyar, offg. C.J. observed that the

transaction of the gift and acceptance which effects the change in the status of the son was clearly separable from the agreement or payment which the law prohibits. In fact the latter bears only on the motives of the party giving and Vellanki v Venkata Rama[10] and Mahableshwar v Durgabai,[12] observed his Lordship, were authorities against the question of validity of an adoption being complicated by enquiries into the motives of the parties concerned. The view that the payment in question would invalidate the adoption would result in visiting with highly injurious consequences an innocent third party, for persons given in adoption are almost invariably children incapable of protecting themselves in the matter, and the liability to be given away, apart from their wishes, in the exercise of parental authority recognised by Hindu Law: And where disputes arise, as in this case, many years after the child passes from one family to another, to hold that the adoption itself is bad would subject him to irreparable loss in respect of property and involve him in other difficulties incidental to the ties he has formed as a member of the adopter's family. His Lordship observed that it was abundantly clear that in communities to which the parties belonged such payments form the rule and the contrary the exception. And so long as these men continue to be moved by the desire for perpetuation of lineage by recourse to the fiction of adoption, the payments will not cease and the consequences of the stricter rule would only be that payments would be made in secret. The view taken by the Judicial Committee in Bhasba Rabidat v Indar Kunwar[15] in regard to an improper condition subject to which an adoption took place was in favour of the conclusion that the validity of the

adoption was unaffected by the payment in question. It would thus seem that, even prior to the Hindu Adoptions and Maintenance Act 1956 the rule was that conditional adoptions were valid on a consideration of the reasons discussed under the different cases above. I am inclined to agree with the view that the gift and acceptance of a boy is a transaction clearly distinct from the agreement of payment. It would be most inequitable to make innocent parties who are invariably children given in adoption by their parents to suffer on account of illegal payments given or received. The two transactions are clearly separable from each other and the illegality of the payments do not make the adoption invalid.

Adoptions valid but illegal agreements for payment are invalid

In Basava v Lingangauda[17] it was held that the Plaintiff's natural family having been a party to the deed of adoption which referred to the deed of gift executed along with it, the case fell under the category of conditional adoptions which are allowed by law. But agreements to adopt a son for consideration are opposed to public policy if they tend to a conflict of interests and duties of parties thereto[18] and the promise to pay cannot be enforeed in law.[19]

Thus it has been held that agreements to pay money

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17. (1895) I.L.R. 19 Bom. 428.

18. Murugappa v Nagappa (1906) I.L.R. 29 Mad. 161, 163, Eshan Kishore v Harish Chandra (1874) 21 W.R. 381; see also Kalavagunta Venkata v Kalavagunta Lakshmi Narayana (1909) I.L.R. 32 Mad. (F.B.) 185; Devrayan v Mutturaman (1914) I.L.R. 37 Mad. 393.

19. Murugappa v Nagappa (see under note 18); Narayan v Gopalrao (1922) I.L.R. 46 Bom. 908.

for adoption,[20] and to give annuity[21] will be unenforceable at law though the adoption itself will be valid. In Thuri Kothandarama v Thesu Reddiar[20] it was held that an agreement to pay a bribe to procure the adoption of a boy is one against public policy and is therefore void. Spencer J. observed that the case of Devarayan Chetty v Mutturaman Chetty[18] was in point. In his Lordship's opinion it was rightly decided in that case that the giving to a third party pecuniary interest in a marriage taking place or, in other words "trafficking in marriage" was opposed to public policy and was not a legal consideration for a contract. This was in agreement with the English law relating to marriage brocage contracts. Reading Kalavagunta Venkata v Kalavagunta Lakshmi Narayana[18] and Murugappa v Nagappa[18] his Lordship thought that no distinction could be made between contracts to make payments in consideration of marriage and similar contracts in consideration of adoption. In Murugappa v Nagappa[18] it was held that though the adoption might be valid, the agreement for payment of money was a separate transaction and illegal. His Lordship observed that this was a transaction of a very different nature from fair and reasonable dispositions in favour of the adoptive widow referred to in Visalakshi Ammal v Sivaramien.[22]

In Narayan v Gopalrao[21] it was held that the grant of an annuity in consideration of giving a boy in adoption was invalid, though the adoption was valid. Macleod C.J. observed that both the lower courts had found in this case

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20. Thuri Kothandarama v Thesu Reddiar (1915) 26 I.C. 779.
21. Narayan v Gopal Rao (1922) I.L.R. 46 Bom. 908.
22. (1904) I.L.R. 27 Mad. 577 (F.B.).

that the promise to pay the annuity was the consideration for the agreement to give the boy in adoption. That would be sufficient to invalidate the agreement and His Lordship observed that he need not consider the question whether the payment of the annuity, if there had been good consideration for it, could be enforced against the heirs of Ganpatrao.

Agreements for the benefit of the adopted son are legally enforceable

In Purshottam v Rakhmabai[23] a Hindu widow while adopting a boy stipulated with the natural father of the boy to have all the rights of management in her husband's estate in herself till her death. It was held that the agreement was not binding upon the adopted boy inasmuch as it was not fair and reasonable. Where the adoptive father, by an express promise to settle his property upon the boy, induced the parents of the defendant to give him their son in adoption but died without having executed such settlement it was held that the equity to compel the heir and legal representative of the adoptive father specifically to perform his contract, survived, and the property in the hands of his widow was bound by that contract. When the widow of the adoptive father nearly 30 years after his death gave effect to his undertaking by executing a deed of gift of his property in her hands in favour of the adopted son, it was held that such alienation was valid as against the next heir by blood of the adoptive father, and he could not, on the death of the widow, avail himself of the plea of limitation which she had

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23. (1914) 23 I.C. 599.

waived.[24] In Asita Mohun v Nirode Mohun[25] it was held that an ante-adoption agreement executed by the adoptive father that if a son was afterwards born of his loins, the adopted son and the after born son shall share equally the estate of the adoptive father was binding on his heir and legal representative.

Ante-adoption agreements curtailing rights of the adoptee

Dispositions of property by the Dayabhaga father are valid against the subsequent adoptee

In cases from Bengal, where, under the Dāyabhāga school a father has absolute powers of disposition of his property, it has been held that it was perfectly within the competency of the testator to give extra-ordinary powers to his widow. In Radhamonee v Jadubnarain[26] the will of a testator authorised the widow to adopt a son and at the same time to retain entire control over all his property as "mistress" during her life-time, even to the disposing of some part of it by sale, and it was held that the adopted son was not competent to question the act of the widow quoad the solanama, and revive, during her life-time, a suit in which the Courts had fully recognised her competency to act as the legal representative of her husband.

So also in another case of the Sudder Dewani Adalat, in a suit to cancel deeds of lease and assignment by a widow,

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24. Bhala v Parbhu (1878) I.L.R. 2 Bom. 67.

25. (1916) 36 I.C. 127; 20 C.W.N. 901.

26. S.D. of 1855 p. 139.

dismissed in affirmation of the judgment of the lower court, it was held that as the widow was left "mistress" of the property for life, the deeds could not be questioned in her life-time.[27]

In Basantakumar v Ram Shankar[28] the Calcutta High Court observed that though a Hindu testator's property may have vested in his widow by will, that did not mean that the adopted son, when he came to be adopted had only a spes successionis and neither a vested nor a contingent interest. Both under the Dayabhaga and Mitakshara schools of Hindu law, the adoption of a son, by a widow, in whom her deceased husband's estate had vested by bequest under a will, would not divest her of the estate which she had obtained. It was clear to their Lordships that, in respect of all schools of Hindu law, when the disposition was by will and the adoption was subsequently made by a widow, who had been given power to adopt, no right of a son who was subsequently adopted could affect that portion, which was already carried away under the will (Krishnamurthi v Krishnamurthi[29] referred to). Without creating, in favour of the adopted son, a charge on the income of the properties which remained vested in the widow, a testator can create a fixed right of future ownership in the properties in his favour. If a reversioner proposes to relinquish his interest in favour of the widow, her interest is not thereby enlarged, since the reversioner had nothing

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27. Prosunnomoyee v Ramsoonder, S.D. of 1859, p. 162, followed in Bepin Behari v Brojonath (1882) 8 Cal. 357; Bhupendra v Amarendra (1916) 43 I.A., 12; 43 Cal. 432.

28. (1932) I.L.R. 59 Cal. 859, 877.

29. (1927) I.L.R. 50 Mad. 508.

to relinquish. But the interest left by a will to a son to be adopted, such as in the present case, not being a mere spes successionis, as contemplated by S. 6(a) of the Transfer of Property Act, the deed of relinquishment by the adopted son in favour of the testator's widow was held to be operative both as a relinquishment and as creating an estoppel. Their Lordships observed that on reading the decisions on deeds of family settlements with care, it seemed that, if there was one principle that flowed from all of them unmistakably, it was that the arrangement must be one concluded with the object of settling bona fide a dispute, arising out of conflicting claims to property which was either existing at the time or was likely to arise in the future. Even where a deed of settlement between a Hindu widow and her adoptive son was inoperative as a family arrangement binding upon the estate or upon persons who were not parties to it, the deed would bind the adopted son to the extent that he, for consideration which he received and presumably continued to receive under it, created an absolute right in favour of that widow.

In Bepin Behari v Brojo Nath[30] a Hindu gave a power of adoption to his wife directing that so long as the wife should live she should remain in possession of all his properties, moveable and immoveable, ancestral as well as self-acquired, and it was held, following Bhagbutti v Bholanath[31] that the widow took a life interest in her deceased husband's properties with remainder to the adopted son.

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30. (1882) I.L.R. 8 Calcutta 357.

31. (1875) I.L.R. 1 Calc. 104.

Mitākṣharā father can dispose of impartible estate property

In cases governed by Mitākṣharā law, under which a son obtains by birth a vested interest in his father's ancestral property, the powers of alienation of ancestral estate of a person who adopts a son are curtailed as soon as an adoption is made except in cases of impartible property.[32] In Sartaj Kuari v Deoraj Kuari,[32] in regard to a raj estate in Gorakhpur, by custom impartible and descending by primogeniture, the family being in other respects governed by Mitākṣharā law, the Raja's alienation of part of that estate was alleged by his son to be invalid as against him. It was held that if there had been no custom of impartibility, the Raja's power over the estate would have been restricted by the law declared in Mitākṣharā Ch. 1, S. 1, V. 27, and the gift would have been void. But, there being the above custom, the question was how far the general law was superseded, and whether the right of the son to control the father's act in this respect was beyond the custom. It was held that in regard to impartible estate, the son's right at birth did not exist where there was no right on his part to partition, also the inalienability depended on custom or on the nature of the tenure. In this case the evidence did not establish that by custom the estate was inalienable.

In Sri Raja Venkat Surya v Court of Wards[32] it was held (a) that in a Hindu adoption there is no implied contract with the natural father that in consideration of the gift of

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32. Sartaj Kuari v Deorajkuari (1888) 15 I.A., 51 (P.C.); 1888 I.L.R. 10 Alld. 272; Sri Raja Venkat Surya v Court of Wards (1899) 26 I.A. 83 (P.C.); Protap Chandra v Jagadish Chandra (1927) 54 I.A. 289 (P.C.).

his son, the adopter will not make a will (b) a gift by a will to a persona designata is not vitiated by a description of him as aurasa son, even if shown to be false. (Fanindra Deb v Rajeswar Das[33] was distinguished). (c) An impartible Zemindary is not inalienable by will or otherwise by virtue only of its impartibility; and in the absence of proof of some special family custom or tenure attaching to the Zemindary and having that effect. Ram Sartaj Kuari's case[32] was followed and held to be applicable to Zemindaries in the Presidency of Madras. Also Beresford v Ramasubba[34] was approved. Their Lordships observed that by saying he had constituted the appellant heir to his property meant only that he had given him the same right of inheritance as a natural son would have. The argument that there was an implied contract not to make a will, the consideration of it being the giving of the son by the natural father was, observed their Lordships, a novel one and without any authority to support it. If it were right, an adopted son would be in a higher position than a natural son and a Hindu would be unable to adopt a son without depriving himself of any power which he might have by law of alienating his property, or at least of disposing of it by a will.

So also in Protap Chandra v Jagadish Chandra[32] it was held that the holder of an impartible Zemindari can alienate it by will although the family was undivided, unless a family custom precluding him from doing so was proved. The absence of any instance in which a previous holder had alienated

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33. (1885) L.R. 12 Ind. Ap. 72.

34. (1889) Ind. L.R. 13 Mad. 197.

the estate by will was not by itself sufficient evidence to establish a custom. Sartaj Kuari and Venkat Surya's cases were followed.[32] The view adopted in Sartaj Kuari's case[32] which altered what was previously well established[35] was to a great extent based upon the Tipperah case[36] where the family was governed by the Dayabbaga, and on cases where the estate was separate property. The decisions of Judicial Committee mentioned above were not inconsistent with Baijnath Prasad v Tej Bali Singh[37] and earlier decisions which dealt with the right of succession to an impartible estate.

Rights of disposition over self-acquired and ancestral property by Mitakshara father

In Purshotam v Vasudev[38] it was held that no coparcenary is constituted between the adopter and the adopted son in respect of former's self-acquired property, any more than there would be between a man and his Aurasa son.

In Lakshmi v Subramanya,[39] a Hindu on taking a son in adoption, executed a "settlement as to what should be done by my adopted son and my wife after my lifetime", provided that on an event, which happened, the wife should

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35. See Abdul Aziz v Appayasami Naicker (1903) L.R. 31 I.A. 1, 9 and Ram Narain v Pertum Singh (1873) 11 Bom. L.R. 397.

36. (1869) 12 Moo. I.A. 523, (Neelkisto Deb v Beerchunder Thakoor)

37. (1921) L.R. 48 I.A. 195.

38. (1871) 8 Bom. H.C.R. 196.

39. (1889) I.L.R. 12 Mad. 490 followed in Narayanasami v Ramasami (1891) I.L.R. 14 Mad. 172; Gamapathi Alyan v Savithri (1897) I.L.R. 21 Mad. 10. [illegible] Durgi v Kanhaiyalal (1927) I.L.R. 49 All. 579 discussed below. See also Vinayak v Govindrav (1869) 6 Bom. H.C.R. (A.C.) 224.

enjoy certain land for life in lieu of maintenance. In a suit by the widow of the executant against the adopted son for possession of the land, it was held, that the instrument was a will. On its appearing that the defendant's natural father, when he gave him in adoption, tacitly submitted to the arrangement contained in it, it was held that the adopted son was bound by its provisions.

In Durgi v Kanhaiyalal,[39] a childless Hindu, the owner of property which had come to him by partition with his adoptive father, made a will leaving everything to his wife. The will provided that "she should be the absolute owner of his entire estate, the adopted boy having no power of interference during her lifetime". The widow, in exercise of a power of adoption conferred on her by this will, adopted a son. The deed of adoption stated that the adopted boy "shall be heir to the estate left by my husband and myself". At that date of adoption the widow was a minor and there were no indications of any intention on her part to divest herself of the estate. It was held that the will of the husband prevailed and the adopted son had no right to possession of the estate so long as his adoptive mother was alive. Their Lordships followed the decision in Lakshmi v Subramanya[39] and referred to Vinayak v Govindrav;[39] Narayanasami v Ramasami,[39] Ganapathi v Savithri Ammal,[39] Visalakshi v Sivaramien[40] and Venkatanarasimba v Subba Rao.[41]

In Ganapathi Aiyan v Savithri Ammal,[39] Subramanian Ayyar J. pointed out

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40. (1904) I.L.R. 27 Mad. 577.

41. (1922) I.L.R. 46 Mad. 300.

> "Even if it be supposed that the rights of the adopted son to challenge a disposition of his father arise from the time of his father's death, his case cannot possibly be put on a higher footing than if he had been adopted at the moment of adoptive father's death. Even in that case the direction as to the allotment of the property to the Charity was an oral devise which became operative the moment the testator died and, as ex hypothesi, the adopted son's title to his adoptive father's estate accrued then and not earlier, it is difficult to see how on principle the defendant could be entitled to question the alienation. For, unlike the case where the adoption takes place before the will comes into force, the adopted son's right, according to the supposition, comes into existence simultaneously with the right of the charity. How then can the former derogate from the latter right?"

In Visalakshi Ammal v Sivaramien[40] it was observed

> "In cases of adoption after the death of the adoptive father by his widow under his authority, every lawful disposition of his property made by him, even by a will, would be binding on the adopted son, for the obvious reason that those dispositions became operative from the moment of the death of the testator, while the adoption must necessarily take place at some time subsequent to the death, and the rights accruing by virtue of such adoption are only in that part of the estate which remains undisposed at the moment of the adoption".

This view was followed subsequently by the Madras High Court in Venkatanarasimka v Subba Rao.[41] The learned judges in this case, while upholding the provisions of a will remarked

> "The adopted son could not, while approbating the provisions of the will under which his adoption was made, reprobate other provisions of the same will and repudiate the bequest to charity".

In Balkrishna v Shri Uttar Narayan Dev[42] a Hindu who was in possession of ancestral property, executed, when he took the defendant in adoption, a vyavasthāpatra, with the consent of the natural father of the defendant whereby he

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42. (1919) I.L.R. 43 Bom. 542.

directed payment of an annual sum for the purpose of lighting lamps in a specified temple. A dispute having arisen as to the validity of the grant it was held that the grant in favour of the temple was invalid as not having been recognised by custom to be appropriate at the time of the adoption or binding upon the adopted son in modification of the strict rules of Hindu law. Their Lordships observed that it would appear to have been established by several decisions i.e. Visalakshi v Sivaramien,[40] etc. that agreements for reasonable provisions for widows ought to be upheld as valid according to general custom modifying the strict terms of Hindu law. But no authorities were quoted in favour of any other persons in such connection or in support of a general extension of the modifications so as to include, as claimed in the case, reservations in favour of charities and religious endowments. Their Lordships therefore declined to recognise the extension claimed and held that the grant in favour of the temple was invalid as not having been recognised by custom to be appropriate at the time of the adoption or binding upon the adopted son in modification of strict rules of Hindu law.

In Vinayak v Govindrav[43] where a separated Hindu made a will and subsequently adopted a son, the boy adopted and his father being aware of the provisions of the will, in which an adequate provision was made for the adopted son, it was held that the subsequent adoption did not invalidate the will. Couch C.J. observed

> "It may well be that if the testator had disposed of his property without making sufficient provision for the son whom he was about to adopt,

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43. (1869) 6 Bom. H.C.R. (A.C.) 224, 230.

such a will would be revoked by the adoption"

and cited a futwah of the Pundits in 6 M.I.A. at p. 320 to the effect

> "If the testator had really given his wife verbal instructions to adopt a son in the event of her not bearing male issue, her compliance with these instructions would of course invalidate the will according to the Hindu law, it being incompetent for the testator who authorised the adoption of a son to alienate the whole of his estate, and thereby injure the means of maintenance of his would-be heir".

Mayne disagrees with this view and remarks that a bequest will be invalid, if of ancestral property but valid if of self-acquired property. The position would also be different after the Hindu Succession Act 1956 even with respect to the testator's share in joint family property. For under Section 6 read with Sec. 30 of the Hindu Succession Act 1956 a Hindu can dispose of his share, by will or otherwise, in ancestral property. Expressing his opinion on the Pundits Futwah ~~Court~~ Couch /C.J. observes that the view was quite consistent with the principles of Hindu law and that, under the circumstances indicated, a Court would probably consider the will revoked by an adoption, but in the present case the provisions of the will may stand consistently with the adoption, for a provision had been made in it for the maintenance of the son and that provision was as ample and liberal as any person in the testator's circumstances was bound to make.

In Balgobind Prasad v Lilakuer[44] the Patna High Court held that a widow holding the estate of her husband under his will as an absolute owner can maintain a suit for possession of a property appertaining thereto, even after adopting

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44. (1945) I.L.R. 24 Pat. 717.

a son under the authority conferred upon her by the said will. Their Lordships relied on Krishnamurthi Ayyar v Krishnamurthi Ayyar[29] quoting Lord Dunedin's dictum

> "When a disposition is made inter vivos by one who has full power over property, under which a portion of that property is carried away, it is clear that no rights of a son who is subsequently adopted can affect that portion which is disposed of. The same is true when the disposition is by will and the adoption is subsequently made by a widow who has been given power to adopt. For the will speaks at the death of the testator, and the property is carried away before the adoption takes place".

Their Lordships observed that grave injustice will be done if after a son had been adopted many years after the death of the testator, all alienations by the widow, assuming these were for legal necessity, could be ignored by the adopted son. Similarly where the adopted son comes into being as a result of a will which gave the widow the power to adopt and the will itself had made a disposition of the property of the testator, it would be incongruous, observed their Lordships, to hold that the will was good in one part and bad as to the other part.

There is absolutely no doubt that even under the old Hindu law a father had a right to alienate his property inter vivos or by will and his son, natural or adopted could not challenge such alienations. As to alienations of joint family property by a sole-surviving co-parcener I have already expressed my opinion in Chapter VI at pages 324-5 and 330-1 distinguishing the case when the sole-surviving alienor is the father and when he is a person other than the father. I have maintained, on reasons stated therein, that when the sole-surviving coparcener is the father he should have the right to alienate the property relying on Manu (VIII, 416

and IX, 104) but not when he is a person other than the father. In the latter case, as long as the widow of a coparcener is alive there is always a possibility of her adopting a son to continue the line of her husband, for whom a share must be reserved, for as Yājñavalkya says (Ch. II, V, 120) "The division among coparceners born of different fathers, is according to their fathers".

Alienations by widow not for legal necessity not binding on the adoptee

As to the effect of alienations by the widow not for legal necessity, it was held in Antaji v Dattaji[45] that the widow, not having higher powers than those of an ordinary Hindu widow who succeeds as heir to a sonless husband, could only make valid alienations for purposes warranted by law. As no legal necessity was shown in respect of the alienations in question in the case, which were made long after the disputes had commenced between her and her adopted son, they were not binding on him or on his alienee the Plaintifff who purchased the adopted son's rights.

In Vyasacharya v Venkubai[46] a full bench of the Bombay High Court held that a settlement of immovable property by an adopting widow in favour of her daughter to take effect upon the daughter attaining majority, assented to by the natural father of the adoptive boy at the time of the adoption,

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45. (1895) I.L.R. 19 Bom. 36. If the adoption is made during the lifetime of the adoptive father, any instrument purporting to confer a life estate or other interest in the property requires registration: Pirsab v Gurappa (1914) I.L.R. 38 Bom. 227.

46. (1913) I.L.R. 37 Bom. 251, F.B.

cannot be enforced by the daughter against the adopted son who repudiated it on attaining majority. The intended gift was made to the sole reversioner. According to Beamon J., an adoption at once terminates the life estate and therefore all alienations merely co-extensive with it. His Lordship felt grave doubts as to whether the reasoning either in Chitko v Janaki[16] or in Ravji v Lakshmibai[47] was adequate to support the conclusions reached by the learned judges who decided those cases. Although their Lordships did appear to recognise that such agreements conditioning an adoption were not necessarily void, the furthest they could go was to say that the minor may ratify them on attaining majority. But this also implied he had the option of ratifying or not ratifying. Fallacy of the Plaintiff's argument, observed their Lordships, lay in borrowing considerations from the law of contract to use in the domain of status. 'Status, may of course be created by contract, but once created, we doubt whether its legal incidents, rights and obligations can be controlled, abrogated or restricted, by any term in the contract creating it.'

I feel that the decision in this case was inequitable in so far as (irrespective of the settlement) the daughter's right to share in her father's property was disallowed. As argued in my article in the All India Reporter[48] I think that the daughter should have been given a quarter or half share in the father's property, irrespective of the settlement, depending on whether the

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47. (1887) I.L.R. 11 Bom. 381.

48. Please refer to the article "Unmarried daughter's rights in Father's property" by V.N. Capoor (1966) A.I.R. (J) pp. 63 to 65.

father's wealth was considerable or inconsiderable according to the rules specifically laid down by the Smriti writers.

Agreements beyond allowing life-interest to widow held invalid

In Premraj v Rajbai,[49] following Krishnamurthi v Krishnamurthi,[50] it was held that an agreement by the natural father of a minor boy, who is given in adoption in another family, which goes beyond allowing the adoptive widow to enjoy the property during her lifetime and curtails the full rights of the adoptee in the property which becomes his on adoption, is not valid in law. In this case an agreement was entered into between the natural father of the adopted boy and adoptive father which provided that during the life-time of the adoptive father and adoptive mother or either of them the adoptee was to provide for the maintenance of his aunt by adoption who had no legal claim against the property. It was held that the arrangement in the agreement went much beyond the disposition which was sanctioned by custom and curtailed the rights of the adoptive son in the property and that it was therefore not valid. The principle in such cases was stated by Farran J. to be that if the stipulations of an agreement contemporaneous with an adoption were unreasonable such as giving to the widow an absolute power of disposition over the property, they should be rejected as ultra vires of the father. If reasonable such as only to define and limit the son's enjoyment of the property, they should be upheld.[51]

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49. (1937) 39 Bom. L.R. 1069.

50. (1927) I.L.R. 50 Mad. 508 (P.C.).

51. Ravji v Lakshmibai (1887) I.L.R. 11 Bom. 381, 403; Panchanon v Binoy Krishna (1918) 44 I.C. 538.

In Panchanon v Binoy Krishna[51] it was held that an ante-adoption agreement by an adoptive mother with the natural father of the adopted son, if it amounts only to a fair and reasonable arrangement for the enjoyment of her husband's property by the widow during her lifetime was valid and binding on the adopted son, especially where there was authority from the husband in that connection. It was also held that neither the adoptive mother nor the natural father of the adopted son had, however, any legal authority to impose a personal contract upon the minor adoptee and that such an agreement between the adoptive mother and natural father was void unless ratified by the minor. In this case a Hindu widow before making an adoption made an agreement with the natural father of her prospective adoptive son that a certain monthly allowance was to be paid to her brother's son during his life-time. It was held that the agreement being in restriction of the adoptive son's rights was not binding upon him.

Condition that the widow should enjoy the property during her life-time held valid

As to conditional adoptions, in Chitko v Janaki,[52] a Bombay case, a Hindu widow in whom had vested by inheritance the whole of her husband's property, moveable and immoveable, agreed to accept a boy in adoption on an express agreement by his father that during her lifetime she should be entitled to such property, subject, however, to the boy's maintenance and education and upon the faith of such agreement adopted the boy, it appearing that she would not have done so at all if it

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52. (1874) 11 Bom. H.C. 199 followed in Ramji v Lakshmibai (1887) I.L.R. 11 Bom. 381, 400.

had not been for such agreement. It was held that the agreement was binding upon the adopted son and that the son's proprietary right was subject to the interest thereby created in favour of his adoptive mother. It was also held that under the Hindu law the power exercised by a father in giving his son in adoption was not only co-extensive with the power of a guardian, but was more like the power of an absolute proprietor.

In the leading case of Krishnamurthi Ayyar v Krishnamurthi Ayyar[53] their Lordships of the Privy Council before summing up their own conclusions, reviewed the authorities in Bombay and Madras. Summing up the Bombay cases, their Lordships observed that as a question of actual decision, the Courts have always upheld the grant to the widow of her interest for life and that whether the stipulation had been made by the husband while still alive, or by herself, it being always the case that the agreement was anterior to or contemporaneous with the adoption itself and that the natural father concurred. But when the gift is to outsiders it has been held invalid and that whether made by the widow or the adoptive father himself. The reasons given have varied. Some have put the deviation from strict principle on custom, some on the view of approbate and reprobate and in one case upon the view that the father as guardian can bind an infant by any contract which is for his benefit. Summing up the Madras cases they observed that as regards the decisions, the general result has been to validate the arrangements so far as the provision is made for the widow, just as in Bombay, but one

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53. (1927) I.L.R. 50 Mad. 508 (P.C.).

case Jagannadha v Papamma[54] is the other way, and the referring judgment of Subrahmanya Ayyar J., is also of that way of thinking. As regards reasons, again they vary, some going on the power of the adoptive father to do what he likes, some on fair and reasonable arrangements and some on approbate and reprobate. From this examination it seemed apparent to their Lordships that it was not possible to reconcile all the decisions and still less the reasons on which they have been based. Their Lordships therefore examined the matter on principle and made the following observations: (i) When a disposition is made inter-vivos by one who has full power over the property it is valid. (ii) If the disposition is by will and the adoption is subsequently made by the widow it is again valid as the property is carried away before the adoption. (iii) consent or non-consent of natural father is immaterial. (iv) But it is quite different when the adoption is antecedent to the date of disposition of the property as the rights flowing from the adoption are immediate and the disposition being inconsistent with these rights cannot affect them. (v) Two propositions were well settled for which no authority need be cited (a) that the natural father loses all power over the son, the moment he is adopted (b) that the adopted son has in the new family the same rights as the natural son and hence the consent or no consent of the natural father regarding dispositions of property by the adoptive father was immaterial and the doubt was expressed by Lord Macnaghten in Bhasba Rabidat Singh v Indar Kunwar[55] was

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54. (1893) I.L.R. 16 Mad. 400.

55. (1889) I.L.R. 16 Cal. 556 (P.C.).

unanswerable. Farran J. was misled by undue veneration for Mr. Mayne for it seems impossible to ascribe any value to the guardianship power of the natural father to bind the son as to property in which he cannot have an interest until the time when the guardianship has ceased. (vi) The doctrine of approbate and reprobate is not applicable as the adopted son has no election. (vii) The only permissible ground is custom. Having regard to a consensus of judicial decisions, excepting that in Jagannadha v Papamma,[54] an arrangement made on the adoption of a Hindu whereby the widow of the adoptive father is to enjoy his property during her lifetime, or for a less period, that arrangement being consented to by the natural father before the adoption is to be regarded as valid by custom. But an agreement or consent by the natural father is not effectual in law or by custom to validate any other disposition, taking effect after the adoption and curtailing the rights of the adopted son as a co-sharer.

Consequently, a will by which a testator gave part of his property to his intended adoptive son, part to his widow for life, part to kindred and part to charity was held as not binding upon the adopted son, although before the adoption took place the natural father executed a deed by which he consented to the provisions of the will and gave his son in adoption subject thereto.

In Surendra v Kala Chand,[56] a Calcutta case, a Hindu by his will gave his widow a life interest in a house and provided that on her death, their adopted son should have the house provided he was of good character, and be obedient

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56. (1907) 12 C.W.N. 668.

to the widow. It was held that the conditions viz., that the adopted son should be of good character, and be obedient and should survive the widow was binding and not void for vagueness. The adopted son had a contingent reversionary interest in the house during the widow's lifetime and this was not alienable. The Madras Courts at one time refused to recognise such agreements.[57] In Lakshmana Rao v Lakshmi Ammal[57] it was held that the power of a Hindu widow with authority from her husband to adopt, to make bonafide alienations, which would be binding on the reversioners if no adoption took place, was not affected or curtailed by the fact that it was exercised in contemplation of an adoption and in defeasance of the right of the son who was about to be adopted. The title of a son adopted by a widow under authority from her husband does not relate back to the death of the deceased. At p. 163 Turner C.J. observed that their Lordships were disposed to think that a child taken in adoption cannot be bound by the assent of his natural father to terms imposed as a condition of the adoption and that, like other agreements made on behalf of minors for other than necessary purposes, it would lie with the minor when he came of age, to assent to or repudiate them. This was understood by their Lordships to be the effect of the Judicial Committee ruling in Ramasami Aiyan v Venkataramaiyan[58] in which the judgment of the Bombay High Court in Chitko v Janaki[59] was noticed.

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57. Lakshmana Rao v Lakshmi Ammal (1881) I.L.R. 4 Mad. 160.

58. (1879) I.L.R. 2 Mad. 91, 101; L.R. 6 I.A. 196.

59. (1874) 11 Bom. H.C.R. 199.

Their Lordships referred to Bamundoss Mookerjea v Mst. Tarinee[60] wherein the Sadr Dewani Adalut carefully examined the authority on which the right of a son, adopted by a widow in the exercise of a power conferred on her by her husband came into being and the widow's position in the interval before the power was exercised. On appeal, the Privy Council entirely concurred with the principle laid down in it. The Sadr Dewani Adalut pronounced that "an authority to adopt a son possessed by a widow does not supersede or destroy her personal rights as widow, and that those rights continue in force until an adoption is actually made", and held that the property is in the widow from the date of the husband's death until the power to adopt is exercised, and that the adoption divests it from the widow and vests it in the adopted son.

In Ramasami Aiyan v Venkataramaiyan[61] the natural father of a boy whom the widow of a deceased Hindu proposed to adopt as a son to her husband, entered into a written agreement with her to the effect that the boy should inherit only a third of the property of his adoptive father. It was held that the agreement was not void, but was at least capable of ratification when the adopted son became of age. The case of Chitko v Janaki[52] was referred to, which decided that an agreement on the part of the father that his son's interest shall be postponed to the life interest of the widow was valid and binding. In Jagannadha v Papamma,[62] however, it was held that a Hindu who is taken in adoption by a widow, acting under

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60. (1858) 7 M.I.A. 177.

61. (1879) I.L.R. 2 Mad. 91. (P.C.).

62. (1893) I.L.R. 16 Mad. 400.

an authority from her husband, was not bound by an agreement entered into by her with the natural father at the time of the adoption. Their Lordships in Ramasami v Venkataramaiyan[61] observed that Bhasba Rabidat v Indar Kunwar[63] was an authority for holding that the agreement between a widow making an adoption under an authority derived from her husband and the natural father of the adopted son cannot prejudice or affect the rights of the son which can only arise when the parental control and authority of the natural father determines. The case of Lakshmi v Subramanya[64] relied on by the Appellant's counsel was one of an agreement between the adoptive father and the natural father and was not, in their Lordships opinion in conflict with the decision of the Privy Council[63] quoted above.

This view was however changed by the full bench decision of Madras High Court in Visalakshi v Sivaramien[65] and brought in line with the view held by the Bombay High Court. Their Lordships in Visalakshi v Sivaramien[65] referred to and concurred with the earlier decision in Panchanon Majumdar v Binoy Krishna[51] and also referred to the case of Bhasba Rabidat v Indar Kunwar[63] wherein the agreement was previous to the adoption and was not embodied in the adoption deed or referred to at the time of the adoption. Benson J. said

> "Then the question in each case would be whether the agreement in regard to the property was in itself a fair and reasonable one and one, which,

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63. (1889) I.L.R. 16 Cal. 556 (P.C.).

64. (1889) I.L.R. 12 Mad. 490.

65. (1904) I.L.R. 27 Mad. 577 (F.B.).

> taken as part of the contract for the adoption was for the minor's benefit as being a condition on which alone the adoption would be made".

Again he says

> "But it would seem that a fair and reasonable disposition of the property is not essentially repugnant to Hindu law or the purposes for which the adoption is allowed and is nowhere forbidden by that law. Such dispositions are commonly made and are upheld by the authority of the caste and the consciousness of the people. In these circumstances I think that the Courts ought not to refuse to recognise them as binding on the minor for whose benefit the adoption coupled with the agreement as to the disposition of the property was really made. It may be assumed that the natural father would not have agreed to the adoption coupled with the disposition of the property, unless it was for the benefit of his son to do so nor would the adoptive father have taken the son in adoption except on the condition agreed to. The adoption, of course, cannot be set aside and to set aside the conditions which was coupled with the adoption, while maintaining the adoption, would require the justification of strong grounds of legal necessity or public policy".

The Patna High Court also referred to these cases in Rani Keshobati v Satyanarayana[66] and observed that inspite of the doubt expressed by the Privy Council in Bhasba Rabidat's case[63] which was clearly distinguishable from the other cases referred to in Visalakshi's case,[65] the opinion expressed in Visalakshi's case,[65] would according to their Lordships, appear to be the correct view of the law. Their Lordships observed that a minor can only act through a guardian, and contracts entered into by a guardian on behalf of the minor were binding on the minor, provided they have been properly entered into and were for his benefit i.e. it was a fair and reasonable agreement which to any reasonable man would have appeared to be for the benefit of the minor.

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66. (1918) 47 I.C. 55.

Also following Visalakshi v Sivaramien[65] the Nagpur High Court held in Chandrabhagabai v Ramchand[67] that an agreement conferring a benefit on the widow at the expense of a minor adopted son must be a fair and reasonable one. Upon a proper interpretation of the documents in the case, their Lordships found that the defendant stipulated for being maintained "in the same state" in which she was then living. It was not merely an ordinary Hindu women's maintenance to which she was entitled but to have a liberal allowance which will secure her in comfort and enable her to do all such religious duties which she was in the habit of then performing. Their Lordships thought that the Plaintiff ought not to be given possession till the defendant's claims under the deed were ascertained and secured to her.

In Balwant Singh v Joti Prasad[68] the Allahabad High Court has held that an agreement depriving an adopted son of his right to take possession of the property of his adoptive father is not prohibited by law. Where such an agreement had been entered into, for example, giving a life estate to the adoptive mother and the remainder to the adopted son, the interest of the son was not merely that of a contingent collateral Hindu reversioner, but he had a vested interest in the property of his adoptive father, which he was competent to deal with, subject only to the previous life estate. He was not barred by the provisions of Section 6(a) of the Transfer of Property Act 1882 from dealing with the property.

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67. (1918) 46 I.C. 850 (Nagpur).

68. (1918) I.L.R. 40 All. 692, 703; Also Visalakshi v Sivaramien (1904) I.L.R. 27 Mad. 577 and Kali Das v Bijai Shanker (1891) I.L.R. 13 All. 391 referred to.

So also in Shanti Parshad v Dhan Deri[69] the Punjab Chief Court held that an agreement between the adoptive father or mother and the natural father or mother of the adoptive boy by which the latter's rights were to take effect after the adoptive mother's death was perfectly valid. Where, therefore, a deed of adoption reserved to the wife of the adoptive father a right to his property during her lifetime it was held that the condition was binding on the adopted son.

When this question first came up before the Privy Council in Ramasami Ayyan v Venkataramaiyan[70] their Lordships remarked

> "How far the natural father can by agreement before the adoption renounce all or part of his son's rights, so as to bind that son when he comes of age, is also a question not altogether unattended with difficulty; although the case of Chitko v Janaki[52] certainly decides that an agreement on the part of the father that his son's interest shall be postponed to the interest of the widow is valid and binding. In this case their Lordships think it enough to decide that the agreement of the natural father which has been set out was not void, but was at least capable of ratification when his son becomes of age".

The question again came up before the Privy Council in the cases of Bhasba Rabidat v Indar Kunwar[55] and Krishnamurthi Ayyar v Krishnamurthi Ayyar[53] which has been discussed at pages 448 to 451 and 469 to 471 respectively. In the former case the adoption was questioned on the ground that the widow had agreed with the natural father of the adopted son, that she should be in possession of the whole estate during her lifetime. Their Lordships of the Privy Council held that the

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69. (1919) 50 I.C. 113.

70. (1879) I.L.R. 2 Mad. 91; 6 I.A. 196. Also see p. 466 above.

adoption was duly performed and was recorded in a deed of adoption which made no mention of any condition, and that no other deed could therefore affect the adoption. In Krishamurthi's case[53] their Lordships held that (1) the only ground on which an ante-adoption agreement with the natural father could be sanctioned was custom (2) that an agreement giving a life interest in the whole property to the widow, the adopted son taking it on her death, would be valid; and (3) that

> "as soon, however, as the arrangements go beyond that i.e. either give the widow property absolutely or give the property to strangers, they think no custom as to this has been proved to exist and that such arrangements are against the radical view of the Hindu law".

This view was followed in a number of subsequent cases.[76]

In Seethiah v Mutyalu[71] where two undivided brothers held a joint property worth about Rs 30,000 and an absolute gift of property worth Rs 1,500 was made to the widow of the deceased brother by the surviving brother as guardian of the minor adopted son of the deceased brother in full discharge of the widow's claim for maintenance, without the liberty of reclaiming an increase of maintenance at any time, it was held that under the circumstances it was a perfectly reasonable provision which was in no way detrimental to the interest of the coparcenary. It was further held that, under the circumstances it was within the competence of the natural guardian to do so and not beyond his powers. If this settlement could be regarded as a prudent one made by the guardian after a due consideration of the interests of the minor it could not

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71. Seethiah v Mutyalu A.I.R. 1931 Mad. 106; Banarsi Das v Sumat Prasad (see note 72 below).

subsequently be questioned by the minor.

In Banarsi Das v Sumat Prasad[72] the Allahabad High Court held that an agreement entered into by the natural guardian of a boy taken into adoption by a widow, under which the widow was to remain in possession of the property during her lifetime was valid and did not affect the validity of the adoption, Krishnamurthi v Krishnamurthi[53] was relied on.

I am in agreement with the various decisions stated above to the effect that if the agreement entered into between the natural father and the adoptive widow is fair and reasonable it should be upheld and made binding on the adopted son. It is optional for a widow to adopt or not, but if she does decide to adopt she would have to sacrifice much of her own interests, it is therefore justified that fair and reasobable agreements entered into between the natural father and the adoptive widow should be enforceable at law, but for which she might as well not have adopted.

Agreement giving absolute estate to the widow in a portion of the property held valid

In T. Raju v Nagammal[73] the Madras High Court held that an agreement by which a Hindu widow proposing to adopt a son stipulates with the boy's natural father for a portion of her husband's estate being settled upon her for her absolute use and enjoyment, with powers of alienation was valid and binding on the son on adoption if the agreement was fair,

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72. A.I.R. 1936 All. 641.

73. (1929) I.L.R. 52 Mad. 128.

reasonable and beneficial to him. The case of Krishnamurthi Ayyar[53] was explained and applied. The question was whether Exhibit I the ante-adoption agreement by which the widow got from the natural father of the boy an absolute estate in some of the lands belonging to the deceased testator was valid and binding on the boy on adoption. The contention of the appellant was that though this agreement had been found to be fair, reasonable and beneficial to the boy, it was not binding on the adopted boy according to the dictum in Krishnamurthi v Krishnamurthy[53] which expressly prohibits an agreement granting an absolute estate in any portion of the estate either on the adoptive mother or on strangers, though grant of life-estate to the widow in the whole of the deceased's estate may be valid by custom and that all previous decisions to the contrary e.g. Visalakshi v Sivaramien[74] must now be taken to have been over-ruled. However Rameson J. thought that the effect of their Lordships judgment in Krishnamurthi's case[53] seemed to him to be as follows: (1) If an agreement provides a gift to strangers it was void. (2) If the arrangement confers advantages on the widow, it will continue to be valid if it was fair and beneficial as before, and invalid, if unfair i.e. an agreement conferring a life-estate on the widow will be regarded as fair and valid. If the whole property was given absolutely to the widow, it will be regarded as unfair. His Lordship inferred from the above summary that if absolute interest was given to the widow in some items of property which did not amount to practically the whole of the property i.e. if substantial part of the

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74. (1904) I.L.R. 27 Mad. 577 (F.B.).

property was still left for the adopted son, the arrangement may still be regarded as fair and beneficial and therefore may be valid. Venkatsubba Rao J. agreed with this view and opined that in the matter of arrangements in favour of the widow's the law had not been in the least disturbed. For determining their validity the tests that were laid down in Visalakshi v Sivaramien[74] must still be applied. The tests to be applied, according to his Lordship were whether the arrangement received the consent of the natural father and whether it was a fair and reasonable one and for the minor's benefit. If these tests were satisfied the courts will uphold the arrangement, if not they will not. I agree with the view expressed in this case that this decision follows as an effect of the judgment in Krishnamurthi v Krishnamurthi[53] according to which if the agreement confers advantages on the widow it will continue to be valid if it is fair and reasonable.

Also the Andhra Pradesh High Court held in M. Purnananda v Purnanandam[75] that an ante-adoption agreement entered into between the natural father of the adopted son and the widow, who was going to adopt his son, by which a reasonable provision for maintenance of the widow is made in her favour absolutely is valid and binding upon the adopted son. On principle, there is nothing wrong in the widow taking a reasonable portion of the estate absolutely for her maintenance under such an agreement.

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75. A.I.R. 1961 Andh. Pra. 435 (438, 439, 440).

Giving properties absolutely to adoptive mother not permissible

In Venkat v Lachmi[76] it was held that an ante-adoption agreement which permits an arrangement between the natural father of the adopted son and the adopting mother relating to the manner in which the properties of the adopted son should be enjoyed by the adoptive mother is sanctioned only by custom and not by any principle based on the legal incidents of adoption or by any text of Hindu law.

An ante-adoption agreement which gives the properties absolutely to the adoptive mother is, as rightly observed by the Judicial Committee in Krishnamurthi v Krishnamurthi[53] "opposed to the radical view of Hindu law".

Arrangements cutting down the rights of the adopted son.

In P. Venkatarao v P. Venkateswararao[77] it was held that ante-adoption agreements should not extend to anything other than the regulation of the rights of the widow in the property and the sanction to it was based on custom. An arrangement cutting down the rights of the adopted son to a life estate was not valid. Their Lordships observed that in Krishnamurthi's case,[53] the judicial committee subjected the conflicting decisions including a full bench decision of the Madras High Court in Visalakshi v Sivaramien[74] to a critical examination. Before the decision of the Privy Council it was thought that any reasonable arrangement which was beneficial to the minor adopted son could be upheld and different reasons were given in support of that view. Their Lodships observed

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76. (1964) 2 Andh. W.R. 383.

77. [1955] 2 An. W.R. 783.

that though on facts, the decision in Visalakshi v Sivaramien[74] could be justified even on the principles now laid down by the Judicial Committee the learned judges in the full bench following the view of Farran J. laid down at page 587

> "The validity of the adoption, if legally made, is quite independent of the validity of any agreement as to the property... But it would seem that a fair and reasonable disposition of the property is not essentially repugnant to Hindu law, or the purposes for which adoption is allowed, and is nowhere forbidden by that law. Such dispositions are commonly made, and are upheld by the authority of the caste and the consciousness of the people".

Their Lordships also referred to the views of Ramesam and Venkatasubba Rao J.J. in T. Raju v Nagammal[73] (discussed above at pp. 479 to 481) and observed that there was the sound reason in support of that decision, namely, validity of such arrangements founded on custom.

In this case, however, under the arrangement the rights of the adopted son were cut down to the life-estate and it cannot be justified on the ground of any custom and no such custom was ever put forward or proved in the present case. Their Lordships observed that the arrangement could not be brought within any of the principles enunciated in Krishnamurthi's case[53] and must be held to be invalid. If an adopted son executes an agreement of the following purport, that his mother is to remain in possession of the property during her life-time, and he is to inherit after her only on the following conditions: That should any serious differences occur between his mother and himself he is to lose all his rights and his adoption to be held void.[78] The question which came up for decision in Mst. Tara Munee v Dev Narayan[78] was

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78. (1824) 3 S.D. 516 followed in Mt. Bhugobutty v Chowdhry

F/note contd. on next page

whether such a document, on the occurrence of such differences conferred any legal right on the mother. The Pandit of the Court answered that it does confer such right because the proprietor of any possessions may dispose of them as he pleases.

In Vithal Laxman v Yamutai[78] one L died leaving him surviving his widow G and the Plaintiff (daughter's daughter). On April 22, 1911, G adopted the defendant. On the same day that the adoption deed was executed the defendant passed an agreement to G, by which he agreed to pay Rs 5000 to the Plaintiff when she attained majority. The Plaintiff, on attaining majority filed a suit to recover the amount of Rs 5000. It was held, dismissing the suit that the document did not constitute a trust in the Plaintiff's favour and therefore she was not entitled to sue on the agreement. It was also held that the document did not constitute a family arrangement as the Plaintiff being a daughter's daughter had no right in the family property. It was held further that the defendant would be bound by the agreement made by him on adoption, as being a major at the time, and if the suit had been brought by the person with whom the agreement had been made, the suit would succeed. The case of Pandurang v Narmadabai[79] was followed.

In Mitar Sain v Data Ram[80] where a Jain widow

Footnote 78 contd. from previous page

Bholanath (1871) 15 W.R. 63; Kashibai v Tatya (1916) I.L.R. 40 Bom. 668; Pandurang v Narmadabai (1932) I.L.R. 56 Bom. 395; Vithal Laxman v Yamutai (1934) 58 Bom. 234; Mittar Sain v Datta Ram A.I.R. 1926 All. 7; Krishnayya v Maharaja of Pithapur (1935) 69 M.L.J. 388 P.C.

79. (1932) 34 Bom. L.R. 1209; (1932) I.L.R. 56 Bom. 395. See also p. 134 above.

80. A.I.R. (1926) All. 7.

adopted an adult person as son to her husband, and where as a condition to the adoption, the adopted son who was a pauper and who by adoption would get a vast property, agreed to pay certain sums to the adoptive widow's brothers, which were comparatively very small, it was held by Mukherji J (Lindsey J. dissenting that the agreement was binding on the adopted son-(contract Act S. 23) that the agreement was supported by valid consideration and was binding on the adopted son.[81] According to Lindsey J; who dissented, to allow an arrangement of this nature to be carried out would be to allow the Hindu widow to do indirectly what Hindu law forbids her to do directly, and no such arrangement could be enforced. The invalidity of such conditions, says Lindsey J., cannot be cured by showing that the adopted son, a person of full age, assented to them. The invalidity arose out of the inherent disability of the widow under the Hindu law to give away portions of her husband's estate and an attempt to impose conditions which would lead indirectly to such alienations being made was absolutely void as being ultra vires.

In Subramania v Sankara Velayudam[82] it was held that an arrangement between the adoptive and natural father disposing of former's family property in violation of the rule in Krishnamurthi's case[53] was not voidable in the ordinary sense of the term but was void against the adopted son. But such an arrangement was capable of validation by the adopted son by his own ratification after the came of age. Such a

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81. Kashibai Ramchandra v Tatya Genee (1916) I.L.R. 40 Bom. 668 followed.

82. (1932) I.L.R. 55 Mad. 408.

ratification need not necessarily be accompanied by all the ingredients of a valid contract and need not be made between the adopted son and the party benefitted by the invalid disposition. Their Lordships further observed that an act amounting to an election by the adopted son to hold it good, sufficient according to the doctrine enunciated by the Privy Council in Rangasami v Nachiappa Gounden,[83] followed and applied in Ramakottayya v Viraraghavayya[84] was sufficient for that purpose. According to the Privy Council decision in Rangasami v Nachiappa Gounden[83] an invalid disposition by the adoptive father at the time of adoption and in consideration of it may become binding on the adopted son if he subsequently ratifies them.[85] The adopted son could renounce all rights in his adoptive family after adoption, but this did not destroy his status as an adopted son, nor restore him to the position he had abandoned in his natural family and upon his renunciation the next heir will succeed.[86] As observed by their Lordships in Lakshmappa v Ramava,[86] an invalid adoption works nothing. It leaves the alleged adoptee precisely in the same position which he occupied before the ceremony, no matter, how formally it may have been celebrated.

In Mahadu Ganu v Bayaji Sidu[87] the Plaintiff was adopted in 1880 by one 'K' widow of Ganu. In June 1885 he

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83. (1918) I.L.R. 42 Mad. 523 (P.C.).

84. (1928) I.L.R. 52 Mad. 556 (F.B.).

85. See also Ramasami v Veneataramaiyan (1879) 6 I.A., 196, 208; Kalidas v Bijai Shankar (1891) I.L.R. 13 All. 391; Pandurang v Narmadabai (1932) 56 Bom. 395, 399-400.

86. Lakshmappa v Ramava (1875) 12 Bom. H.C.A.C. 364, 388.

87. (1895) I.L.R. 19 Bom. 239.

executed a document which recited that he and 'K' had not been on amicable terms and that his adoption had been cancelled and that she adopted another son def. No. 1 and in consideration of Rs 200 paid by 'K' to him he delivered back to her the rights which he obtained by virtue of the adoption and heirship. It was held that the Plaintiff could not renounce his status as adopted son, although he might give up his right of inheritance, and that whatever estate became vested in 'K' by the release came to the Plaintiff on her death either as adopted son of Ganu or as heir of 'K'. It was also held that the defendant's subsequent adoption was invalid and that nothing would pass to him by force of such adoption.

In Bhoopati Nath v Basanta Kumaree[88] the Plaintiff was given in adoption to a certain 'K'. On being ill-treated by his adoptive mother, the Plaintiff's natural mother took him back and 'K' executed a deed cancelling the adoption and later by a deed of settlement gave all properties for performance of Durga and Lakshmi Pujas. It was held that the Plaintiff was entitled to a declaration that he was the validly adopted son of 'K' and was his sole heir according to law. The prayer for Shebaitship by the Plaintiff was left open for future litigation if the Plaintiff chose to bring one when the occasion arose.

In Lakshminarayana v Sundaramayya[89] the Madras High Court held that a bona fide family settlement by the adoptive mother acted upon for a considerable time was held binding on the adopted son (Contract Act (1872) S. 2(d)).

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88. (1936) I.L.R. 63 Cal. 1098.

89. A.I.R. 1950 Mad. 601 (603).

In Venkat Rao v Venkateshwar Rao,[90] following Krishnamurthi v Krishnamurthi[53] the Andhra Pradesh High Court held that an ante-adoption agreement between the adoptive and natural fathers of an adopted son curtailing the right of disposition of property of such son is invalid and not binding. The Bombay High Court has held in Punjabrao v Seshrao[91] again relying on Krishnamurthi v Krishnamurthi[53] that an agreement between a widow and the adopted son that the latter would be an exclusive owner of only 1/3 share of the adoptive father's estate and the remaining share would belong to the widow was binding on him in the absence of proof by him that the agreement was unfair, unreasonable and not beneficial to him.

In the case of arrangements cutting down the rights of the adopted son, if such arrangements were agreed to by an adult adopted son or were subsequently ratified by him on attaining majority, I do not see any reason why such arrangements should not be upheld, unless such assent was obtained by fraud, coercion, undue influence and other illegal methods.

Effect of ante-adoption alienations irrespective of agreement.

Adopted son bound by lawful alienations by widow before his adoption

It had been held in Bamundoss v Mt. Tarinee[92] and other cases following it that the rights of the adopted son

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90. A.I.R. 1956 Andhra 1 (9).

91. A.I.R. 1962 Bom. 175 (182).

92. (1858) 7 M.I.A. 169, followed in Moro Narayan v Balaji (1895) I.L.R. 19 Bom. 809, Vaidyanatha v Savithri (1918) I.L.R. 41 Mad., 75, F.B. at p. 91.

arise only from the date of the adoption in the sense that he is bound by such acts of the widow as would bind the heirs of the husband after her. Farran J. in Moro Narayan v Bulaji Raghunath[92] sets out the position of the adopted son as follows

> "Now an adopted son claims from and through his adoptive father. His adoption, however, does not relate back to the death of his adoptive father (Bamundoss Mukherjee v Mst. Tarinee).[92] He comes in bound by such acts of the widow as would bind the natural heirs of the husband after her and entitled to set aside (in the absence at all events of stipulations to the contrary) such unauthorised alienations of the widow as they succeeding upon her death would be entitled to set aside. The only difference between him and other full heirs of the husband for the purpose I am considering seems to be that rights spring into existence at the moment of his adoption and displace the rights of the widow, while the rights of other reversioners await the determination of the widow's estate by her death".

In Vaidyanatha v Savithri[92] a Hindu widow alienated certain properties for a purpose not binding on the inheritance, and thereafter adopted a son. It was held by a full bench of the Madras High Court that the alienation was not binding on the adopted son and that he could sue during the life-time of the widow to set aside the alienation and recover properties so alienated, his cause of action arising from the time of his adoption. Kumaraswami Sastriyar J. observed that it was then settled that the adopted son had all the rights of a natural son in his adoptive father's estate and that the position of the adopted son was clearly and accurately set out by Farran J., in Moro Narayan v Balaji Raghunath[92] (passage from which has been quoted above).

The Sudder Diwany Court has held that according to Hindu law, a boy adopted by a widow with the permission of her late

husband had all the rights of a posthumous son, so that a sale made by her to his prejudice, of her late husband's property even before the adoption, will not be valid unless made under circumstances of inevitable necessity.[93] In another case the Sadr Dewani Adalut held by a majority that under the circumstances of the case, the special appellant was bound by the deed of compromise, entered into by his mother with the tenants of the estate, as his guardian, which compromise was acquiesced in by him since he reached his majority, until he can show that with respect to the circumstances under which, and to the then capabilities of the tenants regarding which the compromise was made, that such compromise was clearly and unmistakeably to his detriment.[94]

In Ramkrishna v Tripurabai[95] where a Hindu widow, who had inherited her husband's property, adopted a son, it was held that the adoption had the effect of divesting her of the property and putting an end to her estate as heir of her husband. Their Lordships observed that the adoption had the same effect as her death with this difference that after the adoption she has a right of maintenance against the adopted son during the rest of her life. But the right of maintenance so long as it was not a charge on the estate or any portion of it, did not confer on her any right to the estate or entitle her to transfer it by way of sale or mortgage. Thus if a widow, before the adoption severs a portion of the inheritance therefrom and transfers it to a stranger without any proper

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93. Ranee Kishenmunee v Raja Codwunt (1824) 3 S.D. 304.

94. Ranee Doorgasoondree v Goureepersaud S.D. of 1856, 170.

95. (1909) I.L.R. 33 Bom. 88.

or necessary purposes binding the estate absolutely, according to Hindu law, the transfer must cease to have any effect after the adoption, since it could only operate during the time that the estate was represented by her as heir and the result of the adoption is to terminate that estate.[96]

In Lakshman Rau v Lakshmi Ammal[97] it was held that the property was in the widow from the date of the husband's death until the power to adopt was exercised, and the adoption divests it from the widow and vests it in the adopted son. Their Lordships referred to the pronouncement by the Sadar Dewani Adalut in Bamundoss Mookerjea v Mst. Tarinee[98] that

> "an authority to adopt a son possessed by a widow does not supersede or destroy her personal rights as widow, and that those rights continue in force until an adoption is actually made".

Thus such acts of the widow's as are authorised and would be effective against the reversioners would bind the adopted son, and such acts as are unauthorised and in beyond her legal powers could be set aside by the adopted son or by any other successor to the estate.

Alienations with consent of reversioners binding

In Raj Kristo v Kishoree Mohun[99] it was held that an adoptd son was not actually precluded from ever questioning the acts done by his mother during his minority or before his

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96. Lakshman v Radhabai (1887) I.L.R. 11 Bom. 609 and Moro v Balaji (1895) I.L.R. 19 Bom. 809 followed; Sreeramulu v Kristamma (1902) 26 Mad. 143 not followed.

97. (1881) I.L.R. 4 Mad. 160, 164.

98. (1858) 7 M.I.A. 177.

99. (1883) Vol. III, W.R. 14.

adoption, in the same manner as any other reversioner might question such acts. Yet a sale by a widow with the consent of all legal heirs at the time existing, and ratified by decrees of Courts was binding on reversioners as well as on the adopted son, adopted long after the sale. Their Lordships fortified their opinion by referring to the Privy Council view in a Madras case reported in W.R. of April 1865 wherein it was observed that "it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow". So also in Bajrangi Singh v Manokarnika[100] the Privy Council held that a Hindu widow in possession of her husband's estate as his heir had power, apart from legal necessity to alienate the estate, with the concurrence of the reversionary heirs, so as to bind the persons who were the next reversioners when the succession opens out on her death and this principle had been admitted by all the High Courts in India. Their Lordships observed that ordinarily the consent of the whole body of persons constituting the next reversioners should be obtained, although there may be cases in which special circumstances may render the strict enforcement of this rule impossible. It was immaterial whether the concurrence of the reversioner's was given at the time the alienation was made or whether the transaction was subsequently ratified.

In Hanam Gowda v Irgowda[101] certain property

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100. Bajrangi Singh v Manokarnika (1908) I.L.R. 30 All. 1, (P.C.).

101. (1924) I.L.R. 48 Bom. 654. This was a pre-Anant v Shanker case. In Anant v Shanker it was laid down that the rights of the adopted son date back to the deceased adopted father's death. (A.I.R. 1943 P.C. 196).

inherited by a Hindu widow from her husband was mortgaged by her with possession in May 1900. Six months later she sold it to her son-in-law, the defendant for Rs 1500; Rs 1200 of which were to be paid by the latter to the mortgagee in satisfaction of the mortgage. The balance of Rs 300 remained in fact unpaid. The widow adopted the Plaintiff and died shortly after in 1907. The defendant paid off the mortgage and obtained possession of the property in March 1908. The Plaintiff sued in Dec. 1919 to recover possession of the property. It was held that the suit was not barred under Art. 91 of the Indian Limitation Act 1908, inasmuch as it was not essential for the Plaintiff to set aside the sale. Shah, Ag. C.J. observed

> "It may be taken as established ... that in the case of a reversioner it is not essential for him to set aside any alienation by the widow ... It is true that the case of an adopted son, with which we are concerned now, stands on a different footing in this sense that the rights of the adopted son come into existence as soon as he is adopted by the widow, and the rights of the widow as the heir of her husband come to an end on adoption, while, in the case of a reversioner, his rights come into existence on the death of the widow. Subject to that important difference, there is no essential difference between the position of the adopted son seeking to enforce his rights with reference to the property alienated by the widow before the adoption and that of a reversioner seeking to enforce his rights with regard to property alienated by the widow before her death".

Their Lordships referred to and relied on Moro Narayan v Balaji[92] and Ramakrishna v Tripurabai.[95]

It was further held that the suit was not barred under Art. 144, inasmuch as adverse possession of the equity of redemption by the defendant did not commence till March 1908, when he paid off the mortgage and took possession of the property, there having been no overt act on his part prior

to that date to show that he was in possession of the equity of redemption. It was therefore held that the Plaintiff was entitled to recover possession of the property in payment to the defendant of the amount spent by the latter in paying off the mortgage.

Property surrendered to reversioners by the widow

In Yeshwanta v Antu,[102] the Plaint property belonged to one B, who died leaving a widow J and two daughters C and G. C married A (def. No. 1). She died in 1915. In 1920 J and G, the next reversioners joined in passing a deed of gift of the property, the entire estate left by B, in favour of A. In 1926 there was a dispute between A and J the widow and the latter adopted the Plaintiff who subsequently sued to set aside the alienation in favour of A. It was held, dismissing the suit, that the transaction was a valid surrender as the gift amounted in effect to two transactions, a surrender by the widow J to the next reversioner G and a deed of gift by G to A (defendant No. 1).

In Babanna v Channappa[103] it was held that a surrender or release by a Hindu widow of the whole of her estate and interest in the property of her deceased husband to a person or persons entitled in reversion operated to defeat a subsequently adopted son, because the widow had voluntarily operated her own death and thereby accelerated the interest of the reversioners. Further that any arrangement made by the

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102. (1934) I.L.R. 58 Bom. 521.

103. A.I.R. 1947 Bom. 140.

widow inter se with regard to the widow's estate cannot bind anyone who subsequently became entitled to the whole reversionary ownership except when the arrangement was properly limited to providing for a widow's maintenance.

In Ram Nana v. Dhondi Murari[104] a Hindu widow had surrendered her husband's estate to her daughter who was the next reversioner and who agreed to maintain the widow as long as she lived. The daughter having died first, the widow adopted the plaintiff to recover possession of the property from the daughter's husband, it was held that the Plaintiff was not entitled to question the surrender and that the surrender was valid. Macleod C.J. observed that surrender of the life-estate to the next reversioner gave a title to him which was not dependant on the continuance of the life-estate but resulted from its extinction and could not be questioned by the subsequently adopted son. Cramp J. observed

> "...The effect of the surrender by the widow was that the then reversioner took an absolute estate, and as the surrender was an act which is by Hindu Law within the competence of the widow it is not easy to see any ground on which the adopted son can challenge it".

The case of Rama Nana v. Dhondi Murari[104] was referred to by the Bombay High Court in a later case, Shantaram v. Keru Krishna[105] wherein their Lordships observed that the principle of Hindu law enunciated in Rama Nana's case[104] that a valid surrender made by a Hindu widow of her husband's estate to the next reversioners cannot be defeated by a subsequent adoption of a son to her husband was not affected by

104. (1923) I.L.R. 47 Bom. 678.
105. (1948) 50 Bom. L.R. 283. See also article by S. Venkata-Raman: Theory of Relation Back in Adoption and Prior Surrender (1949) 1 M.L.J. 131 where the learned author observes that the surrenderee from the widow has no equity in his favour, the transaction being not one for consideration Where the property is with the surrenderee himself there seems to be no reason why the subsequently adopted son cannot reach the same.

the decision of the Privy Council in Anant v. Shankar[106] so as to give the adopted son the right of challenging the surrender made by the widow.

In Mhalu Shidappa v. Shankar Dadu [106a] a Hindu widow made a gift of the whole of her deceased husband's estate to a stranger. After some months the then next reversioner gave consent to the transaction on receiving consideration for the same. The widow then adopted a son who challenged the gift. It was held by Gajendra- gadkar J. that the gift could not be upheld as a valid surrender. His Lordship observed that the consent of the next reversioner to an alienation made by a Hindu widow does not by itself make the transaction valid; it merely raises a presumption that it is valid and such presumption can be rebutted by the actual reversioner by proving that the transaction was not justified. A surrender by a widow amounts to her civil death and the natural consequence is that the property looks for its next heir. The distinction between a surrender (and consequent devolution of property) and an alienation is real and substantial. Where it is an alienation or transfer of property so-called, consent of reversioners is relevant and may raise a presumption about the validity of the transfer. Where the transfer results from a surrender, it only follows the surrender and cannot be validated by subsequent consent because in such a case there is no surrender at all.

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106. (1943) 70 I.A. 232, [1944] I.L.R. Bom. 116.

106a [1953] I.L.R. Bom. 1231.

So also a full bench of the Bombay High Court in Bahubali Vasant v. Gundappa[106b] have upheld the adoptee's right to divest the surrenderee, over-ruling Ram Nana v. Dhondi Murari[104], Yeshvanta v. Antu[102] and other cases in that line up to and including Shantaram v. Keru Krishna[105]. Chagla C.J. observed (at p. 505) that the adopted son would be able to displace any title which arises by reason of inheritance and this is exactly what happens when the widow surrenders - she merely accelerates the inheritance of the next reversioner, or, with that reversioner's renunciation, the next but one (p.507).

However, in Ramchandra v. Taibai[106c] it was held that where a Hindu widow who had executed a deed of surrender in favour of the next male reversioner with the assent of the two intervening female heirs, subsequently adopts a son, the adopted son can get back the property provided it is in the hands of the surrenderee. If part of the properties had been transferred to an alienee and the remaining properties had devolved upon the heirs of the surrenderee by succession the adopted son cannot get back these properties.

The decision in Ramchandra v. Taibai[106c] has been criticized by Prof. J.D.M. Derrett in an article entitled

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106b. (1954) 56 Bom. L.R. 501, F.B.; [1954] A.I.R. Bom.451, F.B.

106c. A.I.R. 1955 N.U.C. (Bombay) 5895.

"Two Difficult Bombay Cases in Hindu Law."[106d] Derrett observes that the principle upon which an adopted son is permitted to divest a surrenderee from his widowed adoptive mother is that his rights relate back to the moment of his father's death and he takes as his father's fictionally surviving coparcener. The widow does not have the power to surrender, that is to say, accelerate the succession of the next heir, while by a fiction an heir superior to herself is in existence. The dattak's right to avoid a surrender is on a par with his right to avoid an improper alienation. Until this decision in Bombay it had never been suggested that the success of his suit depended upon the answer to the question whether the alienee or surrenderee had alienated the property or had died leaving it to an heir or legatee.

106d. [1956] 58 Bom. L.R.J. 97 at pp. 102 ff. Also see article by Derrett entitled "Renunciation: An Essay in Anglo-Hindu Law." [1965] 67 Bom. L.R. (J) 167, wherein Derrett observes that wherever a father renounces and sons are subsequently born to him the latter should be able to obtain the portion of the Joint family property to which their birthright entitles them, notwithstanding their father's separation by virtue of his renunciation, provided that he renounced in circumstances which do not secure their welfare. Derrett has differed from the full bench decision of Andhra Pradesh High Court in Anjaneyulu v. Ramayya [1965] A.I.R. An.P. 177 F.B. where it was held that sons of the renouncing father conceived as well as born posterior to the renunciation are disentitled to claim a birthright in the grandfather's property. I agree with the views of Prof. Derrett mentioned above, for, the paramount consideration should be given to safeguarding the interests of unborn children. See also Athilinga v. Ramaswami [1945] A.I.R. Mad. 28 for the view that an after-born son can claim re-opening of Partition. Also refer to Ramayya v. Venkanraju [1954] A.I.R. Mad. 864, Shivajirao v. Vasantrao [1908] 33 Bom. 267 and Kusum Kumari v. Dasaratha [1921] A.I.R. Cal. 487 for the views of various courts on release deeds. The adopted son is thus entitled to divest. An aspect of this question was considered in Natvarlal v. Dadubhai [1954] A.I.R. S.C. 61 and the matter is more fully dealt with in Kalishankar v. Dhirendra [1954] A.I.R. S.C. 505 which may be referred to. Support for the proposition contended here is also obtained from Subbareddi v. Govindareddi [1955] A.I.R. Andhra 49; S. Ambalagaran v. Neelamegan [1956] A.I.R. Mad. 160 Mhalu Shidappa v. Shankar wherein Gajendragadkar held that not merely the alleged surrenderee but also his alienees were divested and also the full bench division in Bahubali v. Gundappa.[106b]

Derrett observes that once it becomes known that the surrenderee only has to sell the property in order to be secure, the traditional method of protecting the reversioners by bringing the widow and her often collusive surrenderee or surrenderees to court will be effectively cut off and the hard work of a century's case law will be frustrated.

The adoptee's right to divest the surrenderee was laid down in a full bench decision of the Bombay High Court Bahubali v. Gundappa[106b] and this full bench decision was binding upon the division bench and had not been disturbed by Ramchandra v. Balaji[106e]. It is a matter of common sense, observes Derrett, that if the surrenderee has no title, because he had no right to inherit, his transferees can have no title (or only a voidable title), and his heirs or legatees can be in no better position. They are in precisely the same case as the alienees or heirs or legatees from a transferee from a widow without legal necessity or otherwise contrary to the powers of a woman holding subject to the well-known limited estate. Nor is the position merely a matter of common sense, since the Supreme Court in Shrinivas v. Narayan distinguished divesting of a collateral who had inherited from another collateral of the adoptive father from divesting of an alienee from a widow precisely on the ground that the alienee could satisfy himself whether the alienation would be binding upon an adopted son.[106f]

Now under the Hindu Succession Act, 1956 there can be no surrenders after 17 June, 1956, except in respect of property within the Hindu Succession Act, S.14 (2).[106g]

106e. A.I.R. 1955 Bom. 291 (F.B.). For a discussion of this case see Pages 310 et seq.

106f. A.I.R. 1954 S.C. 379 - Also see discussion of this case on Pages 275 to 276.

106g. See J.D.M. Derrett: Introduction to Modern Hindu Law (1963) Paras. 189 and 696.

I am inclined to agree with the decisions in the cases of Mhalu Shidappa[106a] and Bahubali Vasant[106b] and with the observations of Prof. Derrett mentioned above, for, as long as the widow is alive and capable of adopting a son, it is necessary to protect the interests of the would-be adopted son who sacrifices his rights in his natural family and has to look only to his adoptive father's property for his means of subsistence and for making his life's career. Assuch it would be unjustified if the adopted son is not allowed to challenge alienations not for legal necessity or for the benefit of the estate made by the widow between the dates of the adoptive father's death and of his adoption, and also if he is denied the right to challenge the property surrendered by the widow to the reversioners, for the adopted son has better rights than the reversioners or the widow and his rights relate back to the death of his adoptive father.

So also in Mahalingayya v. Sangayya[106h] it was held that when in a Hindu Joint family, a Joint brother renounces his interest in the Joint family property, the person renouncing severs his connection with the family but such renunciation, apart from extinguishing the interest of the renouncing member, leaves the coparcenary itself intact. If a boy is adopted by the widow of another non-renouncing brother, he is entitled to claim his share in the entire family property. The decision in this case could hardly be dissented to by anyone, for when

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106h. A.I.R. 1943 Bombay 397.

a coparcener renounces his interests in coparcenary property he merely foregoes his interest in the property, thereby enhancing the shares of the other non-renouncing coparceners by equal amounts and hence when the widow of a non-renouncing coparcener adopts a boy he is entitled to claim his adoptive father's share in the entire coparcenary property.

Alienations by sole surviving coparcener (Father) are valid

In Basawantappa v. Mallappa[107] it was held that under the Hindu law, the interest of an adopted son in the family property arose from the date of his adoption and accordingly he cannot challenge any alienation, even if invalid, effected prior to his adoption. Their Lordships quoted from Mayne's Hindu law (9th edn. para. 197) to the effect that " till he was adopted it might happen that he never would be adopted, and when he was adopted, his fictitious birth into his new family could not be ante-dated." Also at para. 198 Mayne says:

"it would be intolerable that he (such coparcener)

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107. (1939) I.L.R. Bom. 245, 252-253.

> should be prevented from dealing with his own, (interests) on account of a contingency which may never happen. When the contingency has happened, it would be most inequitable that the purchaser should be deprived of rights which he obtained from one who, at the time, was perfectly competent to grant them".

These passages from Mayne were also referred to by their Lordships in Udhao v Bhaskar[108] wherein a will by the last surviving coparcener was upheld. In this case it was held that an adoption by a widow who had been given the power to adopt will not affect a will previously made by the husband and that the adopted son will not be entitled to claim the properties which were bequeathed under the will. The case of Krishnamurthi v Krishnamurthi[53] was followed and Amarendra v Sanatan[109] relied on.

In Bhimaji v Hannmantrao,[110] following Veeranna v Sayamma[111] it was held that the last surviving male member of a joint Hindu family was the full owner of all the family properties inspite of an unexercised power of adoption possessed by the widow of a deceased member; and such survivor can alienate all or any of the family properties absolutely without the son adopted after the alienation being able to question the same. The theory that, on an adoption, the adopted son's rights to property ordinarily relate back to the date of his adoptive father's death, does not apply to such a case. Their Lordships also referred to Ramchandra v

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108. I.L.R. (1946) Nag. 425.

109. (1933) 60 I.A. 242.

110. A.I.R. (1950) Bom. 271.

111. I.L.R. (1929) 52 Mad. 398.

Shankar[112] wherein Lokur J. observed

> "It follows, therefore, that the adopted son is entitled to recover his adoptive father's share in the family property, subject of course to any lawful alienations that might have taken place prior to his adoption".

This observation of Lokur J. was also referred to in Vithalbhai v. Shivabhai,[113] wherein the decisions in Veeranna's,[111] Krishnamurthi's[53] and Udhao's cases[108] (referred to above) were followed. In this case one G who was the sole surviving coparcener executed a will by which his wife was to take possession of the properties after his death and maintain herself from the income of the properties. After her death the properties were to go to his two sisters as owners. The sisters were to redeem properties mortgaged by G. If, however, a child was born to the wife, it was to be the owner of the properties. It was held that the two sisters took vested interest in the properties on the death of G, which was liable to be divested by the birth of a child to the widow. The son adopted by the widow after G's death could not question the disposition of family properties lawfully made by G prior to his adoption, as being the sole surviving coparcener he was competent to dispose of the properties by a will. A similar view was expressed in Narayan v. Padmanabh[114] which is discussed at Page 328 above.

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112. A.I.R. (1945) Vol. 32 Bom. 229 (F.B.).
113. A.I.R. 1950 Bom. 289.
114. A.I.R. (1950) Bom. 319.

In Lal Bahadur v. Ambika Prasad[115] the Judicial Committee held, following Brij Narain v. Mangal Prasad,[116] that the sale of part of the family property for discharge of mortgages executed by the Plaintiff's grandfather, not being for immoral consideration, were antecedent debts to discharge which joint family property could validly be sold.

In Sri Raja Venkat Surya v. Court of Wards[117] the judicial Committee held that in a Hindu adoption there is no implied contract with the natural father that in consideration of the gift of his son, the adopter will not make a will. For a discussion of this case pages 113 to 115may be referred to.

In Rani Chhatra Kumari v. Prince Mohan Bikram Shah[118] their Lordships of the Privy Council held that if the adoptive father contracts with the natural father that in consideration of the son being given in adoption, he would devise to the adopted son all his properties absolutely and then leaves a will under which no properties are left to the adopted son but they are left to the testator's widow; the adopted son could not be the owner of the properties merely by virtue of the contract but if his natural father had

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115. (1925) 52 I.A., 443 (J.C.).

116. (1923) L.R. 51, I.A. 129 (which explained Ram Chandra v. Bhup Singh (1917) L.R. 44 I.A. 126.

117. (1899) 26 I.A., 83 (P.C.).

118. (1931) 58 I.A. 279; (1931) 35 C.W.N. 953, 961 (P.C.).

obtained a decree against the adoptive father's estate, the adopted son might conceivably have had some remedy against the natural father, but he could hardly claim the properties from the adoptive father. I think the welfare of the adopted child should be a paramount consideration with the Courts in deciding whether to allow or disallow such alienations. I have already expressed my views on this topic at page 328 (note 180) and at page 127 which may be referred to.

Gift before adoption is valid

The case of Kalyansundaram v. Karuppa[119] before the Judicial Committee was a case of gift before adoption. A Hindu executed a deed of gift of part of his immoveable property and delivered it to the donee. On the following day he adopted a son. Three days later he registered the deed. It was held that the gift was valid against the adopted son. On delivery of the deed to the donee there was acceptance of the transfer within S.122 of the Transfer of Property Act 1882 and thereupon the gift became effectual subject to its registration as required by S. 123. Their Lordships approved the full bench decision of the Bombay High Court in Atmaram v. Vaman[120] wherein it was held

"Where the donor of immoveable property has

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119. (1927) 54 I.A. 89.

120. (1925) I.L.R. 49 Bom. 388 (F.B.).

> handed over to the donee an instrument of gift duly executed and attested, and the gift has been accepted by the donee, the donor has no power to revoke the gift prior to the registration of the instrument".

Alienations by sole surviving coparcener (other than the adoptive father).

In Laxmibai v Keshavrao[121] the defendant No. 1's adoptive father died in 1928 leaving him, surviving his adopted son (def. No. 1), his two widows (def. Nos. 2 and 3) and two other widows of his predeceased undivided brothers (defs. 4 and 5). Prior to his death and before def. No. 1's adoption he had executed a document in the nature of a testamentary disposition which provided that his wife (def. 2) should bring up the adopted son and should manage the property till her death in her independant rights and that in case of dispute between her and the adopted son on the latter attaining majority, she should take half of the net income and the adopted son should take the other half. Shortly after the execution of the document he himself adopted defendant No. 1 and executed in his favour a deed of adoption making him absolute owner of his entire property and reciting that his wife should manage the property in terms of the will. Disputes then arose between def. No. 2 and def. No. 1 which led to a suit which ultimately ended in favour of the former wherein it was held that she was entitled to the management of the estate in terms of the will. In 1935, a widow of a predeceased brother (def. No. 3) adopted the Plaintiff as a son to her deceased husband and in 1937 he brought a suit in order to

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121. [1941] I.L.R. Bom. 306.

recover by partition his one-half share in the suit property. Defendants 1 and 2 contended that as the property had been disposed of by will before the Plaintiff's adoption, the Plaintiff could not assert any claim thereto and that at any rate he could not claim any relief against defendant No. 2 during her life-time. It was held (1) that the family would continue to be joint so long as any widow remained in it with power to adopt. (2) that it did not seem right that an arrangement, which regulated the rights of defendant No. 2 vis-a-vis defendant No. 1 should affect the other coparceners in the joint family acquiring that status by birth or adoption.

The case of Krishnamurthy v Krishnamurthy[53] was referred to. (3) that accordingly the rights or claims of the Plaintiff who was subsequently adopted in the family and who was not a party to the arrangement would not be affected by it.

However, in Bahgonda v Anna[122] the Bombay High Court held that under the Hindu law, alienation of joint family property by the sole surviving coparcener cannot be challenged by a subsequently adopted son to a predeceased coparcener in the family by the widow of the said coparcener. The power of the sole surviving coparcener to treat the property as his absolute property and to deal with it as such was not fettered by the contingency of an adoption being made by a widow inthe family. In this case one B died leaving two sons R and N. R died in 1921 leaving his widow S_1. N died in 1929 leaving a son A and his widow S_2. A died 2 years later; he was then unmarried and a minor. His mother S_2 who

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122. A.I.R. 1968 BOM. 8. This case is discussed in detail at pp. 320 ff.

succeeded to the joint family property adopted the defendant in 1941 as son to her deceased husband. In 1945 the defendant alienated some joint family properties. About two months thereafter S_1 the widow of R adopted the Plaintiff and the latter filed a suit challenging the alienation's made by the defendant. It was held that the principle of relation back that an adopted son's rights to property ordinarily relate back to the date of the adoptive father's death, did not apply to alienations made by the sole surviving coparcener's of joint family prior to the date of adoption and that therefore the alienations made by the defendant could not be challenged by the Plaintiff. The Bombay High Court was inclined to be conservative and to see no reason to follow Krishnamurthi v Dhruwaraj[123] further than necessary.

I am unable to agree with the decision of the Bombay High Court in Babgonda v Anna[122] wherein alienations by a sole surviving coparcener (other than the adoptive father) have been held valid and binding on a subsequently adopted son. This decision is clearly contrary to the Supreme Court decision in Krishnamurthi v Dhruwaraj[123] and to Yajnavalkya (Ch. II, V, 120 quoted at page 465). Besides it is extremely unjust on the adopted son who sacrifices his interests in his natural family, and whose adoptive father being dead, has to rely mainly on his deceased adoptive father's property for subsistence and to build up his future career. I have maintained a similar view in the discussion on this topic in Chapter VI and also on page 464-5 of this Chapter which may be referred to.

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123. A.I.R. 1962 S.C. 59.

The Law under the Hindu Adoptions and Maintenance Act 1956.

Section 13 of the Hindu Adoptions and Maintenance Act 1956 provides that unless there is an agreement to the contrary an adoption does not deprive the adoptive father or mother of the power to dispose of his or her property inter vivos or by will. The section therefore deals with (i) power to dispose of their property by the parents and (ii) with ante-adoption agreements.

(i) Power to dispose of property by the parents

As regards the power to dispose of their property, it will depend upon whether the property was separate or coparcenary property of the adoptive parent and so also will depend the right of the adopted child with respect to it. Under the law prior to recent enactments, which has been dealt with above, under the Dayabhaga school the father had the power to dispose of all the joint family property by transfer inter vivos or by will. So also could a person governed by the Mitakshara, so far as his separate property was concerned, subject to any ante-adoption agreements to the contrary. But he could not do so in respect of his coparcenary property nor could he alienate his share in the joint family property by means of a will. But if he (i.e. the father) were a sole surviving coparcener and alienated the property before the adoption of the child then such an alienation would

be valid.[124] As under the prior Hindu law in so far as males were concerned, so also under the present law, a Hindu by adopting does not deprive himself of the power he had to dispose of his separate property by gift or will; as in respect of such property the adopted son does not in any way stand in a better position than the natural son. Also the will of a Hindu disposing of his separate property is not revoked by the subsequent adoption of a son by him.[53]

As regards alienation of coparcenary property by the adoptive father, if it is alienated before the adoption is made, it will be binding on the adopted son, adopted after the date of alienation.[124] Also in the case of Bombay and Madras where a coparcener can dispose of his coparcenary interest for value, it will be valid and binding on the adopted son. So also a father can make a transfer by will only to the extent of his interest in coparcenary property under S. 30 of the Hindu Succession Act 1956 and such a disposition will be binding on the adopted son. As already discussed above, where the last male owner makes a valid

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124. Veeranna v Sayamma A.I.R. 1929 Mad. 296; I.L.R. 52 Mad. 398; Babagonda v Anna (1966) 69 Bom. L.R. 523. However if the sole surviving coparcener were a person other than the adoptive father it has been laid down by the Supreme Court in Krishnamurthi v Dhruwaraj (A.I.R. 1962 S.C. 59 at p. 61) that a coparcenary continues to subsist as long as there is in existence a widow of a coparcener capable of bringing a son into existence by adoption, and if the widow made an adoption, the rights of the adopted son are the same as if he had been in existence at the time when his adoptive father died and that his title as coparcener prevails as against the title of any person claiming as heir to the last coparcener.

bequest of his property and a son is adopted by his widow after his death, the adopted son is bound by the disposition in the will.[28] Apart from the above mentioned powers of alienation, the power of the father to make alienations of coparcenary property will be restricted by the law relating to alienations of joint family property.

(ii) Ante-adoption agreements curtailing the rights of the adopted son.

If the adopted son is a major at the time of adoption he can consent to a limitation of his rights in the property of the adoptive parents.[125] In Kashibai v Tatya[125] their Lordships of the Bombay High Court observed that there appeared to be no particular authority in which the legal position of such adopted son is formally considered but in Visalakshi's case,[74] Sri Subramania Ayyar, officiating C.J. and Benson J. in making a reference to the full bench expressed the following opinion upon the point.

> "Except where the person given in adoption is of full age and assents to the conditions and agreements between the parties giving and receiving a case which would be very rare, and in which such assent would preclude any question like the present being raised, the transaction would take place without any reference to the adopted son's will and consent".

In this case[125] the adopted son who was of full age, having deliberately accepted the family arrangement and its advantages, their Lordships observed, must be held to it.

Under the prior law, where the adopted son was a minor, an agreement to the effect that the widow was to enjoy her husband's property during her lifetime or for a less

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125. Kashibai v Tatya (1916) I.L.R. 40 Bom. 668.

period was held to be valid.[126] If the arrangement went beyond this i.e., either gave the widow the property absolutely or to strangers then such an arrangement, in the absence of custom to that effect was invalid. Subsequently the Madras High Court held that the rule would not apply where a portion only of the property is settled on the adoptive widow absolutely.[127] An arrangement going beyond the above limit was not void, it could be ratified by the adopted son on his attaining majority.[128] In Gopal Das v Sri Thakurji[128] the Privy Council held that stipulations made by the adoptive mother to the effect that she should retain all her rights in her husband's property may be assumed to be invalid as against a minor adoptive son, but that the latter could, when he comes of age assent to any stipulation made by the adoptive mother or make any new bargains with her. Now, under the provisions of the Hindu Succession Act 1956, a widow has absolute rights in the property devolving on her and under proviso (c) to Sec. 12, an adopted son would not divest any person of any estate vested in any person before the adoption. The question remains, whether adoption now is generically like adoption before, and that it is against the spirit of Hindu law to allow as an adoption a transaction where either the boy/girl or his/her guardian agree to "half-a-loaf".

However in respect of the joint family law to the extent to which it has not been affected by the provisions of the

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126. Krishnamurthi v Krishnamurthi A.I.R. 1927 P.C. 139.

127. T. Raju v Nagammal A.I.R. 1928 Mad. 1289,

128. Ramasami v Venkataramaiyan (1879) I.L.R. 2 Mad. 91; Gopal Das v Sri Thakurji (1943) 41 A.L.J. 292 (P.C.).

Hindu Succession Act 1956, the old law and decisions stand.

English Law on the subject.

Under the English law the parent or parents (adopting jointly) do not lose any right in respect of disposition of their properties as a result of the adoption. There is in English law, no counterpart to the Hindu joint family system wherein a son acquires an equal right with his father in the joint family property from the moment of his birth or adoption and as such can set aside his father's unlawful alienations of joint family property.

Also whilst under the Hindu system, adoptions are the result of private arrangements between the adoptive parents and the natural parents or guardians of the child, under the English law adoptions are as a result of Court orders which are made after following a rigorous procedure to ascertain that the adoption is for the benefit of the child. Under the English law the adoption becomes final the moment an Adoption order is made by the Court, before making which the Court has to satisfy itself that no money has exchanged hands (S. 7(1)(c) of Adoption Act 1958). Usually the natural and adoptive parents never seem to come together or to know each other, hence the possibilities of money exchanging hands in an English adoption is extremely remote. Also as a consequence of S. 7(1)(c) of the Adoption Act 1958 the parties in an adoption where money changed hands would be liable for prosecution.

It would therefore appear that on this topic the English and the Hindu laws stand on entirely different footings and an adoption under the English law in no way affects the rights of the adoptive parents to deal with their properties as they like.

CHAPTER IX

EFFECTS OF ADOPTION IN FORMS OTHER THAN THE DATTAKA

Before the Hindu Adoptions and Maintenance Act, 1956, adoptions in forms other than the Dattaka were also recognised. These were the Kritrima, the Dvyāmushyāyana, the customary adoptions in the Punjab and the Illstom adoption of a son-in-law in Madras and Andhra. The effects of adoption under these forms were as follows:

Effects of Adoption in the Kritrima form:[1]

Kritrima adoption recognised in the Sastras

The Kritrima son is described by Manu as follows:

> "He is considered as a son made (or adopted) whom a man takes as his own son, the boy being equal in class with filial virtues, acquainted with the merit (of performing obsequies to his adopter) and with (the) sin (of omitting them".[1a]

The Mitākshara defines him thus

> "The son made (Kritrima) is one adopted by the person himself, who is desirous of male issue; being enticed by the show of money and land, and being an orphan without father and mother: for, if they be living, he is subject to their control".[2]

The Dattaka Mīmāṁsā says that in the present Kaliyuga only two kinds of sons are recognised viz., the Aurasa and the son given[3] and the term 'son given' is inclusive of the son made.[4]

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1. Also refer to Mayne's Hindu Law (11th edn.) pp. 278-280; Gupte: Hindu Law in British India (2nd ed.) pp. 942, 1029-1032; Kane's History of Dharmastra, Vol. III (1946) p.660; Derrett's Introduction to Modern Hindu Law (1963) paras. 146, 186,200, and Kapur's Hindu Law of Adoption in India and Burma, [illegible] (1933) p. 620-29.

1a Manu IX 169.

2. Mit. XI, 17.

3. Dat. Mim. 1,64.

4. Dat. Mim. 1, 65.

Conditions for the validity of a Kritrima adoption

In Gokhul v Mst. Janki,[5] their Lordships of the Patna High Court observed no ceremonies were necessary to the validity of a Kritrima adoption. A person could therefore adopt in this form without any religious ceremonies and independant of his wife and vice versa, the only requisite being the consent of both the parties. The consent of the adoptee, when he was 'sui Juris' was absolutely necessary for the validity of the adoption, but if he was a minor the adoption could be made if he had attained years of discretion and his parents consented to the adoption. This kind of adoption could as such be made by either a man or a woman, or jointly by both the husband and wife, but when it was made by a woman it was made to herself and not to the husband and no consent of the husband was at all necessary.

Rights of Kritrima son in the adoptive family are liable to frustration

In Kanhaya lal v Suga Kuer[6] (where a person was adopted as a Karta Putra) it was held that such adoptee does not take the estate of his adoptive father by virtue of his original contract with him. In such a case the only contract between the parties was as to sonship and the adopted son was, therefore, liable to be frustrated by an act of the adoptive father or by the subsequent birth of a natural born son. Where a natural-born son was in existence he was entitled to exclude every other kind of son from sharing with him in the

5. A.I.R. 1955 Pat. 487.

6. (1925) I.L.R. 4 Pat., 824, 834.

estate of the father.[7] The Kritrima son did not lose his rights in his natural family.[8] Their Lordships of the Patna High Court in Kanhaya lal's case[6] observed that the Karta Putra system was an extension of the Kritrima form of adoption. There was no doubt, according to their Lordships, that the system of Karta Putra was an invention of the Mithila Brahmins. Under this system a person on adoption did not lose his status in his natural family, though he acquired the status as son of his adoptive father. No ceremonies or sacrifices were necessary to the validity of this particular form of adoption. All that was necessary was the consent of the adoptee which involved the adoptee being an adult. The following passage in Colebrooke's Digest[9] was quoted as stating the position in this particular form of adoption

> "Sons are thus adopted in Mithila, the practice of adopting sons given by their parents was there abolished by Sridatta and Pratihasta, although the latter had himself been adopted in this manner. Their motive was, lest, a child already registered in one family, being again registered in another, a confusion of families and names should thence ensue. A son adopted in the form so briefly noticed in the present section, does not lose his claim to his own family, nor assume the surname of his adoptive father: he merely performs obsequies, and takes the inheritance".

The reason for this particular form of adoption in Mithila is also explained by Macnaghten as follows:[10]

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7. Kullam Singh v Kirpa Singh (1795) 1 Sel. Rep. 11, Mussam Sutputtee v Indranund Jha (1816) 2 Sel. Rep. 222; and Ooman Dut v Kunhia Singh (1822) 2 Sel. Rep. 192 referred to.

8. Sastri's H.L. of Adoption (1916 edn.) 447.

9. Bk. V., Ch. IV, Sec. 10 cited in G.S. Sastri's Adoption 2nd Edition (1916) p. 447.

10. Macnaghten's Hindu Law, Vol. I, 95-100.

> "But according to the doctrine of Vachaspati, whose authority is recognised in Mithila, a woman cannot, even with the previously obtained sanction of her husband, adopt a son after his death, in the dattaka form, and to this prohibitory rule may be traced the origin of the practice of adopting in the Kritrima form, which is there prevalent. This form requires no ceremonies to complete it, and is instantaneously perfected by the offer of the adopting, and the consent of the adopted party. It is natural for every man to expect an heir, so long as he has life and health, and hence it is usual for persons, when attacked by illness, and not before, to give authority to their wives to adopt. But in Mithila, where this authority would be unavailable, the adoption is performed by the husband himself; and recourse is naturally had to that form of adoption which is most easy of performance, and therefore less likely to be frustrated by the impending dissolution of the party desirous of adopting".

Their Lordships of the Patna High Court in Kanhaya lal's case,[6] observed, that the rights of the adopted son would seem to depend on the contract between him and his adoptive father, and the question was what was that contract. Counsel for Appellant relied upon a decision in Kullan Singh v Kirpa Singh.[11] In answer to a question put by the Court in that case the Pandit thus described the ceremony of adoption in this particular form:

> "Let the person (intending to adopt) first consult a Brahmin, and having discovered a propitious moment, let him, in the presence of the Brahmin, and of some friends or relatives, place something in the hands of the person to be adopted, and say to him 'be thou my adopted son; my goods and effects shall become thy property': the person adopted will reply, 'I agree to become thy son'." The Counsel for Appellant relied upon the fact that it was part of the contract that the adoptive father says: "my goods and effects shall become thy property".

According to their Lordships opinion the passage upon which Counsel for the Appellant relied upon did not establish that

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11. (1795) 1 Sel. Rep. 11.

succession to the estate of the adoptive father was inherent in the status of a Karta putra. Also it seemed to his Lordship (Das J.) that this was not a very correct way to describe the ceremonies. Their Lordships in Kanhaya Lal's case[6] next referred to Mst. Sutputee v Indranund[7] and Ooman Dutt v Kunhia[7] (mentioned above) wherein the ceremony is thus described: "The prescribed form for adopting a Kritrima son is as follows. In an auspicious hour let him bathe, and also cause the person whom he wishes to adopt to be bathed, let him present something at his pleasure, and say 'Be you my son', and let the son answer, 'I am become your son'. Then let him, according to custom, give a suit of clothes to the son. These are the legal conditions of adoption;" and then it is said in Mst. Sutputtee v Indramund[7], "the adopted son will inherit the property of his adoptive father, even although the latter have a widow". This is accepted by Mayne as the ceremony in the Kritrima form of adoption. He says as folows:

> "At an auspicious time, the adopter of a son having bathed addressing the person to be adopted, who has also bathed, and to whom he has given some acceptable chattel, says 'Be my son'. He replies: 'I am become thy son'. The giving of some chattel to him arises merely from custom. It is not necessary to the adoption. The consent of both parties is the only requisite; and a set form of speech is not essential".[12]

Therefore it seemed to his Lordship in Kanhaya Lal's case[6] that it cannot be urged that the Plaintiff took the estate of the adoptive father by virtue of his original contract with him.

The next question was whether he was entitled to any share in the estate of the adoptive father. On this

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12. Mayne H.L. (9th Edn.) p. 206.

question different Smṛiti writers had laid down different rules, but their Lordships were concerned in the case with the rule in the Mithila school. After quoting various Smṛiti writers, Vāchaspati Miśra, who is of paramount authority in Mithila, says as follows:

> "Manu and other legislators have said that, notwithstanding other kinds of sons, the legitimate son alone receives the whole estate of his father, but they have also declared that the other sons are sharers of the estate. To remove this contradiction it must be understood that, if the legitimate son be virtuous, he shall receive the whole estate without giving a share to the others, but if he be void of good qualities, and others possess them, they are entitled to have their respective shares, as has been stated above".

In the opinion of Das J. this was conclusive of the rights of the parties in the litigation.

As to the contention that to entitle the natural son to succeed, he must show he is virtuous, in this case the question did not arise as the natural son died soon after birth. If this particular form of adoption was the same as the Kṛitrima form, this passage in the Vivāda Chintāmaṇi (Tagore's edition, p. 287) was conclusive of the rights of the parties. If it was not the same as the Kṛitrima form, as Das J. was inclined to think, the rule laid down by Vāchaspati Miśra must still apply since he had made it clear that where a natural born son was in existence, he was entitled to exclude every other kind of son from sharing with him in the estate of his father.

In Mst. Deepoo v Gowree Shunker[13] it was held that according to Hindu law, the Kritrima son or, as is vulgarly

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13. (1824) 3 S.D. 410.

called, a Karta son, retained the right of succession and of presenting the funeral cake, both in the family of his natural and of his own adopting father. Their Lordships referred to Roodradharopadhyaya cited in the Suddhi Viveka as an authority on the point

> "Such son (alluding to the Kritrima) offers the funeral cake to the person who adopts him, but the office of presenting the funeral cake to his own father and other relations still continues nevertheless".

It would appear from a perusal of the Smriti texts that the authors of the Smritis are silent as to the effects of adoption of the Kritrima son in the natural and adoptive families. But according to the views of ancient writers mentioned above and custom, the Kritrima son retains his right to offer funeral oblations and to inherit to his natural father and other relations. In view of this fact it seems equitable that if the adoptive father has an Aurasa son the latter should be entitled to exclude the Kritrima from sharing with him in the estate of his father.

Kritrima adoption by wife does not make the adoptee the son of her husband

In Sreenarain v Bhya Jha[14] it was held that a person being adopted by the wife did not thereby become the adopted son of the husband and vice versa. Their Lordships observed that it was not stated in any law tract nor was it according to the usage in Mithila that a person adopted by a wife with or without the husband's permission became the adopted son of her husband. The adopted son of a widow succeeds to her

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14. (1812) 2 S.D. 29, 34.

stridhan but not to the property of her husband. The Pandit of the Court gave the following exposition of the law on the point

> "If a man appoint another his adopted son that person, so adopted, stands in the relation to him of a son, and offers up his funeral oblations, and is heir to his estate, but the person, so appointed, does not become the adopted son of the adopter's wife, nor does he offer funeral oblations to her, nor succeed to her property. If a woman appointed an adopted son, he stands in the relation to her of a son, offers to her funeral oblations, and is heir to her estate; but he does not become the adopted son of her husband, nor offer to him funeral oblations, nor succeed to his property. If a husband and wife jointly appoint an adopted son, he stands in the relation of son to both, and is heir to the estate of both. If the husband appoint one person, and the wife another, adopted son, they stand in the relation of a son to each of them respectively, and do not perform the ceremony of offering funeral oblations, nor succeed to the estate of the husband and wife jointly; such is the usage of Mithila".

In Collector of Tirhoot v Huropershad Mohunt[15] it was held that under the Hindu law current in Mithila, a Hindu widow has the power to adopt a son in the Kritrima form with or without her husband's consent, but such a son would not by virtue of such adoption, lose his position in his own family, nor would he succeed to the property left by the husband of his adoptive mother, but would be considered her son and entitled to succeed to her only. Macnaghten, speaking of the Kritrima form of adoption, remarks in Vol I, p. 76 of his Hindu law thus:

> "Another peculiarity of this species of adoption is that a person adopted in this form by the widow does not thereby become the adopted son

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15. (1867) 7 W.R. 500 referred to in Mela Singh v Gurdas (1922) I.L.R. 3 Lah. 362 (F.B.).

> of the husband, even though the adoption should have been permitted by the husband",

and again at p. 100-101, he says

> "But it does not appear that the prohibition in Mithila which prevails against her receiving a son in adoption according to the Dattaka form, even with the previous sanction of her husband, he being dead, extends to her receiving a boy in adoption according to the Kṛitrima form, - and the son so adopted will perform her obsequies and succeed to her peculiar property though not to that of her deceased husband".

It may be observed here how in the respect of succession to the adopter's property, the effects of an adoption in the Kṛitrima form by the husband or wife is similar to the effect of an adoption by a husband or wife under the English law. For according to Section 17 of the Adoption Act 1958, unless the adoption is made by two spouses jointly, the adoptee is considered as the child of the person who actually adopts it, and the adopted child's rights of inheritance arise only through such adoptin g parent, which is akin to an adoption in the Kṛitrima form mentioned above; and unlike an adoption in the Dattaka form where the adoption by the widow makes the child the adopted child of her deceased husband also, his adoption 'relating back' to the death of the deceased adoptive father for purposes of succession to his property.

Kṛitrima son inherits adopter's property to the exclusion of his wife

In Smt. Sabitri v Mrs. F.A. Savi[16] their Lordships of the Patna High Court quoted from the Pandit of the Sudder

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16. A.I.R. 1933 Pat. 306, 394-5.

Dewanny Adawlut's exposition in Sreenarain v Bhya Jha[14] (quoted above at p. 521) and observed that the husband can adopt in this form without any religious ceremonies and independant of the wife and vice versa, and the Kṛitrima son adopted by the husband takes his property as heir to the exclusion of the wife. A son adopted in the dattaka form - a form which was not yet obsolete in Mithila[17] also excluded the wife, but unlike the Kṛitrima son he became a member of the adopter's family and thus incurred obligation to the adoptive father's wife. The Mithila husband's power to adopt a Kṛitrima son to himself and thus prevent his wife from succeeding to his property, observed their Lordships, goes far to show that her interest in his property is even weaker than under the Mitākshara.

This case[16] was referred to by their Lordships of the Patna High Court on Gokhul v Mt. Janki,[18] wherein their Lordships observed that no ceremonies were necessary to the validity of a Kṛitrima adoption. A person, therefore, could adopt in this form without any religious ceremonies and independant of his wife and vice versa, the only requisite being the consent of both the parties. The consent of the adoptee, when he was 'sui Juris' was absolutely necessary for the validity of the adoption, but if he was a minor, the adoption could be made if he had attained years of discretion and his parents consented to the adoption. This kind of adoption could be made by either a man or a woman, or jointly by both the husband and wife, but when it was made by a woman, it was made

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17. See Chandreshwar Prasad v Bisheswar Partap (1926) I.L.R. 5 Pat. 777.

18. A.I.R. 1955 Pat. 487.

to herself and not to her husband and no consent of the husband was at all necessary. Their Lordships observed that by his adoption the adoptee became the son of the adopter, and he was not entitled to claim any relationship, or any right of succession to any one other than the adopter in the new family. The 'Karta-putra' inherited his adoptive father's properties as his heir, if there be no natural son, to the exclusion of his wife and at the same time he did not lose his rights of inheritance in his natural family. In such a case the only contract between the parties was as to sonship and the adopted son was, therefore, liable to be frustrated by an act of the adoptive father, or by the subsequent birth of a natural-born son. Where a natural-born son was in existence he was entitled to exclude every other kind of son from sharing whith him in the estate of his father.[19]

Kritrima relationship confined to contracting parties.

When the sons of a certain person, who had been adopted as a Kritrima son, sought to set aside certain alienations of self-acquired property which the adoptive father had made, on the double ground that as grandsons they had an interest in that property and that the alienations were for improper purposes, it was held[20] that as the alienations were proved to be for legitimate purposes and the relationships established by the Kritrima form of adoption were confined to the contracting parties and did not extend beyond them on

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19. Smt. Sabitri v Mst. Savi, A.I.R. 1933 Pat. 306 (see note 16 above) and Kanhaya lal v Suga Kuer (1925) I.L.R. 4 Pat. 824 (see note 6 above) referred to.

20. Juswant v Doolee Chund (1882) 25 W.R. 255.

either side, the Plaintiffs in this case had no right to set aside the alienation's which the adoptive father of their father had made. Their Lordships observed that under the Hindu law as laid down in Macnaghten Vol. I, p. 76 and also in a previous decision of the Court in Vol. 8 of the Weekly Reporter the relation of the Kṛitrima son extended to the contracting parties only, and the son so adopted will not be considered the grandson of his adoptive father's father, nor will the son of the adopted son be considered the grandson of the latter's adopting father. It was also clear to their Lordships that under the Hindu law the Kritrima son does not inherit collaterally.

Kritrima son does not succeed collaterally

So also in Mst. Shib Koeree v Joogun Singh[21] it was held that a son adopted in the Kritrima form in the Mithila province, does not become a member of the adopting family so far as collateral heirship was concerned, the relationship of the Kṛitrima for the purposes of inheritance extending to the contracting parties only. A Kṛitrima adopted son, when adopted by a widow with or without the authority of her husband, cannot in any case succeed to more than his adoptive mother's property, and has no claim to that of collateral's. Macnaghten in his work on Hindu law (Chapter VI on Adoption, Wilson's Edition p. 79) says:

> In Mithila where the 'Kṛitrima' form of adoption prevails, there is no sort of restriction except as to tribe, but he (i.e. the adopted son) as well as his issue continues after the adoption to be considered a member of his natural family

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21. (1867) 8 W.R. 155.

> and takes the inheritance both of his own family and of his adopting father" (vide also 3 Select Reports 307).

Again

> "Another peculiarity of this species (i.e. the 'Kritrima') of adoption by a widow, is that the person so adopted does not become the adopted son of the husband, even though the adoption should have been permitted by him",

and again

> "The relation of 'Kritrima' son extends to the contracting parties only, the son so adopted will not be considered the grandson of the adoptive father's father, nor will the son of the adopted be considered the grandson of his adopting father. He does not inherit collaterally".

In Sutherland's synopsis of the Dattaka Mīmāmsā and Dattaka Chandrikā, we find as a gloss on Sec. VI, 67, Sec. II, 18-19 of these works, the following:

> "The 'Dattaka' adopted son ceases to have any claim on the family or estate. This rule would not apply to the 'Kritrima' adopted son, who would necessarily be the son of two fathers".

Again:-

> "The adopted son (Dattaka that is) inherits not only of his adoptive father, but likewise lineally and collaterally of the near and distant kinsmen of that person. This rule would not apply to the 'Kritrima' son as usually adopted in the Mithila country".

And this amongst other things distinguishes him from the son given etc. And again (Note 18, page 228) the 'Kṛitrima' son as usually affiliated in the Mithila country, would indeed take the estate of his adoptive father, but continues a member of the family of his natural father, and is not regarded as prolonging the line of his adopter". At again (Note 21, page 229), it is stated,

> "in the Dvaita Nirnaya, Vāchaspati Misra declares that no relation obtains between the Kritrima adopted son and the father of the adopter, from which it is inferred that such adopted son could

> not inherit of that person and a fortiori from the collateral kinsman of the adopter. The same inference in fact results from the Kritrima son in question not being considered a member of his adopter's family".

In Colebrooke's translation of the Mitākṣharā, the following note is found (see Mitākṣharā, p. 355)

> "The son adopted in the form adopted in this section i.e., the Kritima, does not lose his claim to his own family, or take the surname of his adoptive father".

This view was taken by the Sudder Court in the case of Sreenarain v Bhya Jha[14] where it was held that the person adopted by the wife as her son, does not become the adopted son of her husband, or succeed to his property, though the adoption should have been permitted by the husband; but as her son, he will succeed to her property. So also in Collector of Tirhoot case[15] it was held that the Kritrima son, adopted by the widow does not lose his position in his own family nor does he succeed to the property of the adoptive mother's husband but is entitled to succeed to her only. In Strange's Hindoo law, Vol. II, p. 283, a "Kritima" adoption is spoken of in the following terms "Kṛitima, the son made. In point of ceremonial, it is the same with that of the Dattaka, omitting the sacrifice or burnt offering which is not performed at it. Succeeding partially to the adoptive rights, his connection with his natural family by which he has never in fact been more than tacitly relinquished remains to the son made in full force. And this amongst other things distinguishes him from the son given. Initiation into the family of the adopter is not practised where alone this form of adoption is at this day, generally speaking, in use, namely in the Mithila country whatever might be its effect if performed in assimi-

lating it more to that of the son given especially in the event of its not having previously taken place in the natural family of the adopted. In Mithila also the widow is as of right at liberty to adopt without special authority for the purpose, the adopted in this case succeeding to her exclusive property only; not to that of her deceased husband, to whom he is not considered in any way related".

Their Lordships in Shib Koeree's case,[21] observed that there was, thus, a strong current of authority for the dictum that a Kritrima adopted son, when adopted by a widow with or without the authority of her husband, cannot in any case succeed to more than his adoptive mother's property, and had no claim to that of collaterals. The Kritrima adoption has peculiar effects flowing from customary law. As the Kritrima adoption is the result of a contract between the parties, the rights of succession of the Kritrima son are limited to the property of his adopter. Also as such a son does not lose his position in his natural family including his rights of inheritance in that family, there seems to be nothing unfair in not giving him any rights in the property of a person other than his adopter in the adoptive family or in denying him rights to succeed collaterally in the adoptive family. It would be interesting to observe how the peculiar effects of the Kritrima adoption are in many respects similar to the effects of adoption in some of the modern States e.g. Massachusetts and Virgin Islands of the U.S.A., Tasmania, New Zealand etc. discussed above in Chapter III (pages 164 ff.), I.e. the adopted child inherits from the adoptive parent but not from the adopters relatives.

Customary adoptions in the Punjab

The effects of adoption under the Punjab Customary Law have been discussed in Chapter II, pages 86 to 87 ; Chapter III, pages 137 to 138 , and Chapter V, pages 214 to 224 which may be referred to.

Customary adoptions in Southern India

Rights of adoptee are governed by custom

Prior to the Hindu Adoptions and Maintenance Act 1956 several customary adoptions were recognised in Southern India. These were the adoptions according to the Aliyasanthana, the Marumakatthayam or the Nambudri schools. In Gopinath v Santhamma[22] their Lordships of the Madras High Court held that the object of an adoption according to the Aliyasanthana school of Hindu law was secular and not religious. But the religious motive was not totally excluded. The object being to perpetuate the tarwad, females were often taken in adoption. Though such adoption resembled the Kritrima form it did not mean that all the incidents of a Kritrima adoption were attached to an adoption in an Aliyasanthana family. The law applicable to an adoption in an Aliyasanthana family was essentially customary. Whether an adopted person in an Aliyasanthana family lost his right of inheritance in the natural family could be decided only by the evidence of custom.[23] Being a customary form of adoption its incidents and legal effects on the rights to property could be decided according to the custom prevailing in particular families governed by such systems of law. The concept of adoption was one derived under the Hindu law and the effect of adoption was that the adopted son occupied the same position in the adoptive family as a natural born son. The normal rule in every case of

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22. (1956) 2 M.L.J. 38.

23. Mayne's Hindu Law and Usage, 11th edition p. 980; Sundara Iyer's Malabar law (1922) edn., pp. 28-32 referred to.

adoption, whether sanctioned by law or by custom or usage, was that it effected a severance of the adoptee from the family of his birth. Their Lordships observed that if there was any custom contrary to this rule it was for those who relied on such custom to establish it. Their Lordships relied on the following observations of a bench of the Madras High Court in Secretary of State for India v Santaraja Shetty[24]

> "Adoption in the case of persons governed by the Aliyasanthana law is very different from adoption in the case of persons governed by the Hindu law; in the former, the main, if not the only object of adoption is to nominate a person to succeed to the property. There is an absence of religious motive which must accompany a valid adoption governed by the Hindu law. Hence it seems to us that in the case of persons governed by the Aliyasanthana law adoption is but slightly different from the nomination of a successor".

Also Madhavan Nair J. in Seetha Neithyar v Kelu Menon[25] observed

> "When the text-writers say that the form of adoption resembles the Kṛitrima form I think what they purport to emphasise mainly is this, that the adoption is based purely on secular motives and that it has no religious significance, and nothing more. As I have said, the law applicable to the case being essentially a customary law, the question can be decided only by having recourse to evidence as to custom in the absence of texts or express decisions of this Court".

Their Lordships in Gopinath's case[22] observed that the likening of adoption under the Aliyasantana system to that of Kṛitrima adoption did not mean that all the incident's of Kṛitrima adoption were attached to the customary adoption among those who were governed by the Aliyasanthana system and that the

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24. (1913) 25 M.L.J. 411 at 422.

25. (1939) 2 M.L.J. 697.

adoptee retains the rights to his property in the natural family. As observed by Madhaven Nair J. (see above), adoption being based on customary law, whether the adoptee retained his rights in the natural family has to be proved.

Gopinath's case[22] has been discussed by Derrett in an article entitled "Adoption in Aliyasanthana Law. An Illustration of the relation between custom and Law,"[26] wherein the learned author disagrees with the learned Judge's view that such adoptee loses rights in the natural family. Derrett observes that on examining the various subsidiary sons catalogued by Manu and others the only one who is specifically debarred from taking his natural father's property is the dattaka,[27] and the mention of the dattaka in this way clearly shows that the other secondary sons were not cut off for the purposes of inheritance from their natural families. Further Derrett observes that adoptions in Malabar are clearly not dattaka adoptions at all. They are based on ancient pre-Aryan customs and quotes a number of instances of effects of customary adoptions in S. India, Ceylon and Jaffna and opines that these and other instances lead to the inevitable conclusion that there was no basis for the learned Judge's presumption that all undocumented adoptions must prima facie be of the 'complete transfer' type.

I am, however, inclined to agree with their Lordships' decision as being more in consonance with equity and justice. For in the case of Aliyasanthana and Marumakhathayam adoptions the adoptee becomes a member of a new Tarwad and acquires full rights therein and it would be but equitable that he should be deemed to have renounced his rights in the old Tarwad.

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26. [1956] 2 M.L.J. J. 97 ff. See also Machingal v. M. Kelu A.I.R. 1939 Mad. 564.
27. Manu IX, 142.

Severance from natural family - Marumakhathayam Law

In Lekshmi v. Narayani[28] their Lordships observed that the very notion of adoption, both under the Hindu law and the Marumakhathayam laws that the adoptee was completely severed from his original family and became a member of the adoptive family and that under the Marumakhathayam law there was no such thing as a person being a member of the Tarwad and not a member of it at the same time. If a person was a member of the Tarwad he was entitled to partake in all the rights which the members of the Tarwad had, including the right to succeed to the separate properties of another member who had left no heir to such properties.

It will be seen from a perusal of the above cases that in case of the customary adoptions in Southern India, unlike the Kritrima adoptions or the customary adoptions under the Punjab law, such an adoption like the Dattaka adoption has the effect of complete severance of the adoptee from the natural family[22] to the adopter's family and such an adoptee is entitled to partake in all the rights which a member has including the right to succeed to the separate property of another member.[28]

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28. A.I.R. 1955 N.U.C. (Trav-Co.) 3482. Also a similar opinion was expressed in Velayudhan v. Nilakantham A.I.R. N.U.C. (Trav-C) 1101. See also V.N. Subramanya Iyer: Hindu Law, 1952, 393.

Nambudris governed by Hindu law as modified by custom

As to adoption among Nambudri Brahmins, in Vasudevan v. The Secretary of State for India,[29] the last male member of the illam died about 1859, leaving defendant No. 1 and her mother the sole surviving member of the illam. Defendant No.1 had been previously married to a member of another illam by a sarvasvadanam marriage, but her husband died without issue. In 1872, defendant No.1 and her mother appointed defendant No.2 an adult member of a third illam, to be manager and heir of their illam and raise up issue for it. In a suit by the Secretary of State to declare a right of escheat of the property of the Nambudri illam, it was held by the Madras High Court that the Nambudri Brahmins were governed by Hindu law, as modified by special customs adopted by them since their settlement in Malabar[30] and that there was sufficient evidence of a custom that a Nambudri widow could adopt or appoint an heir in order to perpetuate her illam in the absence of 'dayadies' with ten or three days pollution, and the appointment of defendant No.2 was valid against the Crown.

In Neelkantan v. Velayudhan[31] the Supreme Court has held that in a Sarvasvadanam marriage the daughter retains all the rights in the family properties in spite of her marriage, in the same way as a son does and if there was an agreement to that

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29. (1888) I.L.R. 11 Mad. 157.
30. Thandavan v. Valliamma (1892) I.L.R. 15 Mad. 336; Chemnantha v. Palakuzhu (1902) I.L.R. 25 Mad. 662 (wherein Vasudevan v. Secretary of State of India at note 29 above was referred to).
31. A.I.R. 1958 S.C. 832 .

effect the son-in-law will also become a member of the family. In Nambudri custom the appointment of the daughter herself as Putrika was not used. Only the arrangement with the bridegroom was made whereby the issue would be, as it were, adoptive issue of the appointing father of the bride[32].

'Adoption of the Resident Son-in-law and the Illatom.

The 'adoption' of the son-in-law, known as the Illatom in Madras and Andhra Pradesh, the Sarvasvadanam in Kerala and the Gharjamai in Punjab, Bihar, Western India and Bengal is another form of customary 'adoption'.

The Patna High Court laid down[33] that there were two most important elements of fact which were necessary to constitute the status of a Ghar-damad which were first, that there must be the definite intention on the part of the parties

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32. Also see article by J.D.M. Derrett entitled "Sarvasvadanam Marriage and the rights of children born of it." [1967] K.L.T., J, 63-66.

33. Naika Uraon v. Butna Uraon (1930) I.L.R. 9 Pat. 683.

that that status should be acquired, and secondly, that the person adopted as a ghardamad should, in the same way as a Hindu who is adopted as a son, definitely forego his title to succeed to any property of his natural father.

In the Punjab where the usage of Khana-damad is recognised; the purpose is to benefit the daughter and her male issue. It was observed in Nanda Singh v Kheta[34]

> "The custom of Khana-damad is designed to benefit the daughter and her issue. Mst. Raman the daughter died many years ago and Kharku her husband succeeded to the property for life on the equivalent of a widow's estate. Mst. Raman left no issue, male or female, and on Kharku's death it appears to us obvious that the property must revert by inheritance to her own blood relations. Kharku was not her 'heir' by law or custom for anything beyond a life estate, and it is clear that if he were not her full heir, the sons of Kharku by another woman can have no right to succeed to their step mother's property".

So also it was remarked in Fazal Ahmad v Ditta[35]

> "A Khana-damad certainly does not rank as an adopted son; if he did, he would succeed to the whole estate and his sons by any wife would succeed after his death, no matter whether their mother was daughter of their father's adoptive father or not, whereas it is beyond dispute that if a Khana-damad had no sons by that wife who was daughter of the man who made him a khana-damad he certainly could not pass on the estate to his sons by another wife. But to assume that because a khana-damad does not rank as an adopted son he can take nothing except what is expressly gifted to him is wrong".

As observed in Rattigan's Digest the Khana damad is an institution whereby a sonless man associates with him in his life-time his son-in-law, who resides with him,

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33. Naika Uraon v Butna Uraon (1930) I.L.R. 9 Pat. 683.

34. (1913) P.R. No. 53 p. 209.

35. (1910) 216 P.L.R. p. 660 quoted in Rattigan's Digest (Thirteenth Edition) at p. 451.

cultivates for him, and eventually succeeds to him for a life-interest, acting as a means of transmitting the estate to the original proprietor's son.[36] Neither the Khana damad nor his descendants are precluded from claiming a share in ancestral property of own family, merely by reason of his having succeeded his father-in-law.[37]

In the Smritis which lay down the different kinds of sons including the various kinds of adopted sons, the adoption of the son-in-law is nowhere mentioned. It is therefore doubtful if the affiliation of the resident son-in-law can be considered as an 'adoption' under the strict Smriti law. According to the various customary laws e.g. in Punjab, Bihar etc. such an affiliation is recognised although the effects differ under the various customs as mentioned above.

The Illstom adoption - specific agreement necessary

The custom of taking an Illston son-in-law is prevalent among the Kamma, Kapus and the Reddi castes in South India. In Sidda Reddi v. Subbamma[38] their Lordships of the Mysore High Court observed that the practice of Illstom was

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36. Notes on Punjab Custom by Ellis, 1921 Edition p. 90 quoted in Rattigan's Digest (13th edn.) p. 451.

37. Rattigan's Digest (13th edn.) p. 457 referring to C.A. 1064 of 1877; C.A. 141 of 1878; 68 P.R. 1878 i.e. (1878) P.R. No. 68.

38. (1932) 10 Mys. L.J. 352; Vatrapu Subba Rao v. Pamireddi Mahalakshmamma A.I.R. (1930) Mad. 883 referred to.

a departure from the ordinary Hindu law and accordingly it lay upon the party claiming to over-ride the provisions of Hindu law to strictly substantiate his claim and more so since it could not generally be done by reference to settled rules of law, as in the case of an ordinary adoption, the practice of Illstom being of late occurrence and confined to certain castes. The taking of a son-in -law, in Illstom, especially when the father-in-law had no son, could be done without theexecution of any document or performance of any ceremony but it could not be inferred that every son-in-law who became an inmate of his father-in-law's house, thereby acquired the status of Illston son-in-law. To constitute a person an Illstom a specific agreement was necessary. By an Illstom adoption, it did not follow that in every case the adopted son took the place of a natural son in every respect. What his rights should be in regard to the properties of his father-in-law was a matter of agreement between the parties and had to be set up and proved in each case.[38]

In Gadiyam Narayudu v. Mallavarapu Venkamma,[39] the Madras High Court observed:

> "It is not sufficient to constitute a person an Illatom that he lives in his father-in-law's house, assists his widow after her husband's death and is employed by her to pay the Sirkar Khist. To constitute a person an Illatom, a specific agreement is necessary".

In Nagi Reddi v. Nanjundappa[40] it was held that the Plaintiff having performed his part of marrying the daughter and thereafter having been treated as an Illatom son-in-law, it must be inferred that there was an agreement on the basis of which the Illatom affiliation was carried out.

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39. (1890) 13 Ind. cases 866.

40. A.I.R. 1940 Mad. 761.

Also the Madras High Court has held in Venkayalapathi v. Negandla[41] that when a boy has been taken into a family on the understanding that he would be married to a daughter and given the status of an Illatom son-in-law the arrangement may be completed by the solemnisation of the marriage even after the death of the father-in-law.

Existence of Illatom no bar to dattaka adoption

In N. Krishnamma v. Kamepalli Venkatasubbayya[42] their Lordships of the Privy Council observed that there was no analogy between adoption proper, the object of which was primarily religious, and Illatom affiliation, the object of which was secular only, and the rules of Hindu law did not apply to the latter, which was regulated solely by custom. An Illatom son was not a coparcener of the natural born son or adopted son, though they could live together like an undivided family. Special custom obtaining in each case or family could alone sanction the status of an Illatom son and it must be affirmatively proved as any other disputed fact.[43] An Illatom affiliation was valid even though the affiliator had a son or an undivided brother living. Where a person had several daughters, it was held that he could take an Illatom son even where he was not hopeless of having male issue.[44]

In Chenchamma v. Subbaya[45] it was held that a person could adopt a dattaka son though he had affiliated an Illatom; and that although an Illatom son-in-law and a son adopted into

41. (1911) 11 I.C. 25.
42. (1919) 51 I.C. 1 (P.C.)
43. Hanumantamma v. Rami Reddi (1881) I.L.R. 4 Mad. 272.
44. Hanumantamma v. Rami Reddi (1881) I.L.R. 4 Mad. 272.

the same family may live in commensality, neither they nor their descendants could, in the absence of proof of custom, be treated as Hindu coparcener's having the right of survivorship.

Ties in natural family not severed

In Ramakrishna v Subbakka[46] one N, a Hindu who had admittedly been taken an illatom into the family of his father-in-law, died, leaving property which he had acquired by virtue of his illatom marriage. He was succeeded by his son, who died without issue, leaving only a sister surviving him. In a suit by a brother of N who was the managing member of his family, to recover the property from the sister of the last holder, it was held that the Plaintiff was prima facie entitled to recover, notwithstanding the admission, and that it was for the defendant to establish any special circumstance to rebut his claim. Their Lordships referred to the decision in S. Balarami v S. Pera Reddi[47] wherein it had been held that a person who was taken as an illatom into another family did not thereby lose his right of inheritance in his natural family. Under the custom of illatom which prevailed among the Reddis or Pedda Kapu caste of Nellore, the illatom son-in-law did not thereby lose his rights of succession to the estate of his natural father's divided brother. The tie of relationship between him and his natural brother was not severed as was when there was an adoption under Hindu law.

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45. (1886) I.L.R. 9 Mad. 114.

46. (1889) I.L.R. 12 Mad. 443.

47. (1882) I.L.R. 6 Mad. 267.

In Challa Papi Reddi v Challa Koti Reddi[48] it was observed that the circumstance of being taken as an illatom constituted a mode whereby the person taken acquired property and if that circumstance was not in consistent with the person affected still remaining a member of his own family, Shephard J. thought, he could not see why it should affect the rules which would ordinarily govern the devolution of his property on his death. His Lordship observed that it may seem hard that a member of the family into which the illatom son-in-law was taken should be ousted from the property originally belonging to that family in favour of one who belonged to another family, which was a necessary consequence of the alienation in favour of the illatom son-in-law.

Illatom son-in-law not a coparcener in affiliater's family

In Malla Reddi v Padamma[49] the father, since deceased, of the second defendant took into his family an illatom son-in-law, who died, leaving a son. After the death of his son, one of his two daughters (who were his only children) sued to recover a 1/4th share of the property left by the second defendant's father. It was held that the Plaintiff was entitled to recover, in the absence of proof of a custom by which the rights of the Plaintiff's father should have passed by survivorship to the second defendant.

In Panda Patya v Panda Venkamma[50] it was held that a person had been taken as an illatom son-in-law must be

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48. (1871) 7 M.H.C.R. 25.

49. (1894) I.L.R. 17 Mad. 48.

50. (1915) 29 I.C. 54.

proved by very reliable evidence. Their Lordships observed that it was very easy for men who were married into a family to set up a claim to a share of the family property on the footing that they had been taken as illatom son-in-law, but such contentions required to be proved by very reliable evidence, as they were claims, which were very easy to set up and which apparently there was a great temptation to set up. This case was referred to with approval in Subbarao v Mahalakshmamma[51] where their Lordships of Madras High Court observed that the legal incidents of an illatom adoption had not been judicially settled nor were they of universal application, they had to be proved in each case by evidence and held that an illatom relationship to a father-in-law's brother was very unusual and that on the evidence in the case the relationship was not established. Their Lordships in Subbarao v Mahalakshmamma[51] also referred to the following observation of Holloway J. in Challa Papi v Challa Koti[48]

> "The power of complete disposition as against both a widow and daughters has, rightly or wrongly been upheld, and there would be great difficulty in saying that the son-in-law so affiliated could be in a better position ... There is nothing illegal in saying that the person so affiliated shall inherit all of which the affiliator died possessed but that he does not and cannot stand in the same position as one who became a joint tenant at the instant of birth".

In Sitanna v Viranna[52] it was held by the Privy Council that the fact that the alleged illatom son-in-law never troubled about his share in the property of his own family and went on living jointly with Tiruppayya (the after

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51. (1931) I.L.R. 54 Mad. 27.

52. A.I.R. 1934 P.C. 105, 107b.

born natural son of his father-in-law), attending to the cultivation while the latter attended to his duties as village Munsif, coupled with the widow's statements, suggested that he enjoyed the status of an illatom son-in-law during Tiruppayya's lifetime and that it was only to be expected that he should claim a share after Tiruppayya's death. The illatom custom among Reddis and Kammas of Madras Presidency was based on the necessity of having men in the family to look after the cultivation.

In A. Venkatappadu v M. Atchayyamma[53] referred to the judgment of Varadachariar J. in Muthala Reddiar v Sankarappa[54] wherein the learned judge applying the principles laid down in earlier cases held that apart from the proof of custom, the descendants of an illatom son-in-law could not claim rights of collateral inheritance in preference to reversioners of the last male holders of an estate. An illatom son-in-law was therefore entitled to the same share as the son or an adopted son, but he did not take by survivorship. In the present case[53] the Plaintiff's husband entered into an arrangement for consideration by which on his death the properties which he got or to which he was entitled as the illatom son-in-law passed to the defendants. Their Lordships held that the Plaintiff had no claim to maintenance as against the defendants and that by reason of the terms of the settlement deed, on the death of defendant 1 had no claim on the property. Since the illatom son-in-law and the son were not coparceners

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53. A.I.R. 1945 Mad. 172.

54. [1934] M.L.J. 706.

and did not take by survivorship the Plaintiff (widow) was not entitled to claim maintenance against the son's heirs[55]. I am, however, inclined to observe that, in this case the equitable interpretation of the agreement would have been to read it as the heirs (whosever they may be) taking, subject to the rights of maintenance of those entitled to claim it from the said property.

Rights of the Illotom

In P. Lakshmi v. L. Lakshmi[56] the Supreme Court held that in Andhra an Illatom son-in-law was a boy incorporated into the family with a view to give a daughter in marriage and was customarily recognised as an heir in the absence of a natural born son. Summarizing briefly (1) the rights and status of the Illatom son-in-law depend on custom obtaining among particular communities.[57] (2) He takes an equal share with the natural born son.[58] (3) If there is a custom to that effect, he can demand partition.[59] (4) He has a right to deal with the property he acquires as an Illatom son-in-law as he

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55. Sivada Balarami Reddi v. Sivada Pera Reddi (1882) I.L.R. 6 Mad. 267; Chenchamma v. Subbaya (1886) I.L.R. 9 Mad.114 and Malla Reddi v. Padmamma (1894) I.L.R. 17 Mad. 48.

56. A.I.R. 1957 S.C. 314; Also in Narassayya v. Ramachandrayya A.I.R. 1956 An p. 209.

57. Refer to cases under note 55 above.

58. Ramkrishna v. Subbakka (1889) I.L.R. 12 Mad. 443; Narasimha v. Veerabhadra (1893) I.L.R. 17 Mad. 287; Challa Papi Reddi v. Challa Koti Reddi (1871) 7 M.H.C. 25.

59. Chinna Obayya v. Sura Reddi (1897) I.L.R. 21 Mad. 226.

likes, and his sons have no right by birth therein.[60]

(5) Among the Reddis of Vellore, it has been held that an illatom son-in-law does not lose his rights of succession in his natural family[61] and vice versa the members of his natural family do not lose their rights of succession to him.[62]

(6) There is no right of survivorship between him and the adopted or natural born son of his father-in-law, in the absence of a custom.[63]

According to Prof. Derrett, the illatom is entitled to succeed even after the passing of the Hindu Succession and the Hindu Adoptions and Maintenance Acts. He observes

> "Since by custom the illatom is entitled to inherit on intestacy from his father-in-law,[56] though not from the latter's relations, it would seem that here is a right by virtue of the son-in-law relationship established upon a footing independent of both sonship as understood in the Hindu Law of succession, and of adoption as understood both under the modern Hindu law and the Anglo Hindu Law of adoption. We must turn to the overriding section of the Hindu Succession Act this time, when we find that, as before, laws are saved which deal with matters for which no provision is made in the H.S.A. and which are not themselves inconsistent with anything in the H.S.A.[64] Upon this view, accordingly the illatom is still entitled to succeed".[65]

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60. Challa Papi Reddi v Challa Koti Reddi (1871) 7 M.H.C.R. 25.

61. Sivada Balarami Reddi v Sivada Pera Reddi (1882) I.L.R. 6 Mad. 267.

62. Ramkrishna v Subbaka (1889) I.L.R. 12 Mad. 443.

63. Chenchamma v Subbaya (1886) I.L.R. 9 Mad. 114; Malla Reddi v Padmamma (1894) I.L.R. 17 Mad. 48.

64. Hindu Succession Act, S. 4.

65. Introd. to Modern Hindu law: J.D.M. Derrett (1963) p. 134.

I agree with this view and it would appear on the above reasoning that the Illatom is still entitled to succeed, and that similar would be the position of the gharjamai and sarvasvadānam son-in-law. So also it would seem that under S.8 of the H.S.A. the statutory heirs and the Illatom (counting as a son) must be called to succession together[68]

A perusal of the rights of the Kritrima son and the resident son-in-law in Punjab discussed above would show the close similarity with those of the Illatom son-in -law of Southern India. But whilst the Illatom son-in-law has a right to deal with the property he acquires as an Illatom as he likes,[60] the Illatom constituting a mode whereby the person taken acquires property and on his death the property passes to his heirs in his natural family,[48] under the Punjab customary law, if the resident son-in-law dies issueless or remarries after the death of his wife (whose father had taken him as the resident son-in-law), such property reverts to his father-in-law. In view of what I have said above (at page 537) I think the latter is a more equitable rule.

The Dvyāmushyāyana

The term Dvyāmushyāyana has a two-fold meaning. The Mitākharā uses this term in the sense of the 'Kshetraja' or a son raised on another's wife. It is also understood to mean a son who is adopted as a son of two fathers by an agreement, express or implied. As to the effect of adoption of a son in the Dvyāmushyāyana form the Privy Council held that the effect by the Hindu law of an adoption in the Dvyāmushyāyna form was

not to extinguish the adopted son of his lineage to his natural father, or to bar him of his right of inheritance in his father's estate.[66] The ceremonies prescribed in the Dvyāmushyāyana form of adoption were the same as in the case of an absolutely adopted son or a Shudha Dattaka. The only addition was of an undertaking or stipulation that the child should belong to both the giver and the adopter.[67]

Special agreement necessary

In Wooma Daee v Gokoolanund[68] the Calcutta High Court observed that to constitute a Dvyāmushyāyana there must be a special agreement between the two fathers to that effect or the relation must result from some of the other circumstances indicated by Sir W. Macnaghten at p. 71 of his Principles and Precedents. And he there states the consequence to be different from those of an ordinary adoption, inasmuch as the children of adopted sons would revert to their natural family. Hence the adoptive father fails by such adoption to perpetuate his own line of male succession, a circumstance which renders the consent of divided brothers to such adoption more improbable.

In Beharilal v Shib Lall[69] the Allahabad High Court held that the natural mother of a Hindu adopted into another branch of his family by the Nitya dvyāmushyāyana form of adoption did not, on account of such adoption, lose her right

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66. Nilmadhub Doss v Bishumber Doss (1869) 13 M.I.A. 85 (P.C.)
67. Krishna v Parameshri (1901) I.L.R. 25 Bom. 537.
68. (1878) I.L.R. 3 Cal. 587.
69. (1904) I.L.R. 26 All 472.

of succession to her son in the absence of nearer heirs. An adoption in the absolute dvyāmushyāyana form depended upon and had its efficacy in the stipulation entered into at the time of the adoption between the natural father and the adopted father and did not depend upon the performance of any initiatory ceremony by the natural father. In this case there was evidence of an agreement between the natural father and the adoptive father that 'R' should remain the son of both though all ceremonies including Sradh was performed by the adoptive father.

The Dattaka Mīmāṁsā[70] describes two forms of Dvyāmushyāyana viz., the Nitya - under stipulation and the Anitya where the ceremony up to tonsure is performed by the natural father and the adoptive father is connected with the ceremony of investiture etc. - in which case he succeeds only in the adoptive family. The double relationship proceeds from the special agreement between the adoptive and the natural father at the time of the adoption in which case the adopted son inherits both the estates and performs obsequies of both 'fathers'. Adoption in the absolute form depends upon the stipulation between the two father's is the view of Macnaghten in his Hindu law Vol. I, p. 71. Sir Thomas Strange in his Hindu Law Vol. II, p. 173 observes

> "... Nitya datta ... the adoption is from the same gotra before or after tonsure or from different gotra before tonsure. In the Anitya form different gotra after tonsure in the natural family. Performance of tonsure is the cause of the temporary nature of the latter species of adoption".

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70. D.M. Art. 41, S. 6.

Further the adoption in the Anitya form was of a temporary character, lasting for the life-time of such adopted son and the natural children of the son adopted in the Anitya form remained in the natural family of their father. As stated in a later case in Basappa v Gurlingawa the Anitya dvyāmushyāyana is now obsolete.[71]

Their Lordships in Behari lal's case[69] observed that it is by gift that the relation of sonship with his natural family is severed as appears from Art. 19, Sec. 2 of the Dattaka Chandrikā which explains the text of Manu. It seemed to their Lordships in Beharilal's case[69] that in the case of the absolute Dvyāmushyāyana form it is a qualified gift. As in this case the gift was a qualified gift hence the natural mother did not lose her right of succession to her son adopted into another branch of his family by the Nitya dvyāmushyāyana form, in the absence of nearer heirs.

The Dvyāmushyāyana inherits in both families and vice versa

In Kantawa v Sangangowda[72] a boy was adopted according to the dvyāmushyāyana form. On the death of the boy, the adoptive mother and the natural mother were held by the Bombay High Court to take jointly and equally as co-heiresses. If the adoptive mother, after the inheritance had passed in this way adopted another son, the natural mother was held not divested of the property inherited, especially when her

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71. (1933) I.L.R. 57 Bom. 74. Also see Maynes Hindu Law (9th Ed.)Para 173 at p. 241.

72. A.I.R. 1942 Bom. 143.

consent was not obtained for the adoption. Broomfield J. observed that a son adopted in the dvyāmushyāyana form inherited in both families.

So also, as has been held in Basappa v Gurlingawa[73] both families inherit to him. As to the question what happens if the adoptive mother, after inheritance had passed in this way adopted another son, Broomfield J., in Kantawa v Sangangowda,[72] disagreeing from the trial judge observed: (a) A mother succeeding to her son took a limited estate like a widow succeeding to her husband. (b) If there were two or more co-widows, an adoption by one divested the estate of both. (c) If a mother who had succeeded as heir to her son adopted a son to her husband, her own estate was divested. His Lordship observed that so far the learned trial judge was right. The learned trial judge, however, seemed to think that it followed from these propositions, which were not necessarily connected, that if two mother's - the adoptive and the natural, had inherited the estate of their son, a subsequent adoption by one of them divested the estate of both. Broomfield J. remarks that the trial judge made a somewhat dogmatic assertion that what applied to co-widow's must necessarily apply to co-mothers, if that expression may be used. But he gave no reason for it except a somewhat vague reference to "other considerations and general principles of Hindu Law". The trial judge took the view that the coparcenary established was revived by the adoption but Broomfield J., found difficulty in understanding what in the

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73. (1933) I.L.R. 57 Bom. 74.

circumstances could be meant by reviving the coparcenary estate. In any case the doctrine of revival seemed to him to be contrary to the decision of the full bench in Balu Sakharam v. Lahoo[74] The contention on behalf of the respondent that the rules laid down by the full bench in the case did not apply because the facts here were not the same, was not accepted by the Court. Broomfield J. observed that the full bench was laying down principles and not merely disposing of the particular case out of which the reference arose.

In Ganpatrao v. Balkrishna[75], a person adopted his brother's only son, then a married man, in the dvyāmushyāyana form. The respondents were the sons of the adoptee born after his adoption. The adoptee pre-deceased his adoptive father and on the latter's death a dispute relating to the succession to his estate arose. The respondents, claiming title to the estate as grandsons of the deceased, applied to obtain a succession certificate when the appellant, a son of another brother of the deceased, contended that the respondents belonged to the natural family of the adoptee and so they could not inherit in the family of the adopter of their father. It was held that the respondents were the grandsons of the deceased and entitled to succeed to his property.

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74. (1937) 39 Bom. L.R. 382.

75. [1942] I.L.R. Bom. 340.

As to the origin of adoption in the dvyāmushyāyana form, Kane observes as follows:

> "Yaj. II. 127 and Baud. Dh. S. II. 2, 21 provide that a K shetraja is the son of both the begetter and of the husband of the wife on whom the son is procreated. Therefore such a son is called nitya dvyāmushyāyana (because he is always the son of two fathers). When the Kshetraja became obsolete and forbidden, the only dvyāmushyāyana was an only son taken in adoption with a stipulation as described above.... It is now held that every adoption is presumed to be in the simple (Kevala) form, unless a stipulation that the boy will be the son of both is proved (when it will be a dvyāmushyāyana adoption)".[76]

As the dvyāmushyāyana adoption results from stipulation between the natural and adoptive fathers that he is to be a son to both the fathers, he therefore inherits both the estates and performs the obsequies of both fathers.

On the question of inheritance by the dvyāmushyāyana in the natural and adoptive families, the Dattaka Chandrikā[77] lays down the following rule,

'The son given, who is a dvyāmushyāyana, if both his adoptive and natural fathers have no other male issue, takes the whole estate of both. One adopted, where legitimate issue (of the adopter) existed does not participate (in the estate of the adopter), but a legitimate son being born (to the natural father) subsequent to adoption, the adopted son (in question) takes half the share which is prescribed by law for an adopted son, exclusively related to his adoptive father (where legitimate issue may be subsequently born to that person)', i.e., he would take half of one-third, one fourth or one-fifth which he would have taken according to the different provinces had he been adopted in the Dattaka

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76. Kane: History of Dharamsastra, Vol. III pp. 686-687.
77. V 33-34.

form by the adoptive father. In his natural family in such a case he takes half the share of an Aurasa son. But according to the Vyavahāra Mayūkha[78], when legitimate sons are born in both the families, the dvyāmushyāyana takes his usual share in the adoptive family only. On the point when only one of the families has Aurasa sons the Mayūkha is silent.

In G. Narsi Reddi v. R. Rami Reddi[79], the Andhra Pradesh High Court has held that the dvyāmushyāyana form of adoption had long become obsolete in Madras on the East Coast and therefore an adoption in that form is not now valid. Their Lordships observed that the dvyāmushyāyana form of adoption was never recognised by the Mitāksharā. The ancient texts or source books of Hindu law did not recognise the dvyāmushyāyana now recognised in parts of Bombay State and the State of Uttar Pradesh. Their Lordships further observed that this form of adoption seems to have been a contribution or gloss of commentators who came much after Vijnanesvara and that the only dvyāmushyāyana (son of two fathers) spoken of in Mitāksharā is the Kshetraja, i.e. the son begotten by a person on the wife of another person, and this species of son is now obsolete in Hindu law.

In this connection it may be noted that there is no mention of the 'dvyāmushyāyana' in the various kinds of sons enumerated in the Smritis. Further, according to Manu[80] the Gotra (= family name) and the Riktha (= wealth) of the adopted son ceases in the natural family. Thus it would appear that not only the Smritis are silent on the subject of the dvyāmushyāyana' but the text of Manu mentioned above[80] would seem to tilt the balance against such adoptions.

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79. (1964) 1 An. W.R. 261.
80. Manu IX, 142.

As explained below, the dvyāmushyāyana adoption is now abolished under the Hindu Adoption and Maintenance Act, 1956.

The position under the Hindu Adoption and Maintenance Act, 1956

Section 5 of the Hindu Adoption and Maintenance Act specifically lays down that all adoptions made after the

commencement of the Act shall be made in accordance with the provisions of the Act and any adoption made after the promulgation of the Act in contravention of the said provisions will be void. Sub section (ii) of S. 5 mentions the consequences of a void adoption. Adoption under the Act is either valid or void, it is never voidable. A void adoption has no legal effect from the very beginning. It amounts to no adoption at all having taken place. The sub-section (ii) of S. 5 lays down further that a person whose adoption is void does not lose the right to share in the property of the family of his birth and he is not entitled to inherit or even to be maintained out of the estate of the 'adoptive family'.

Thus in view of Section 5 discussed above and Section 12 (which lays down that in the case of an adopted child its ties in the natural family are completely severed and replaced by those in the adoptive family) of the Hindu Adoption and Maintenance Act 1956, the various kinds of adopted sons recognised under the old law including the Kritrima, the Dvyāmushyāyana etc. are abolished under the Act and any adoption to be legally valid has to be made in accordance with the provisions of the Act.

But as rightly observed by Prof. Derrett, the illatom is still entitled to succeed even after the passing of the Hindu Succession Act, the reasons for arriving at this conclusion have been mentioned above at pages 545 to 546.

The position under English Law

The different kinds of sons or adopted sons is a peculiar feature of the Hindu system and has no counterpart in the English law. Adoption under the English law is effected

by a procedure laid down by Statute and becomes legal (i.e. has all the legal incidents of adoption) as soon as a Court order is made. Thus contractual or customary adoptions or the 'Dvyamushyayana' (the son of two fathers) etc. have no counterpart under the English law.

The effect of an adoption under English law, is in some ways a mixture of the effects of adoption under the Dattaka and Kritrima adoptions. As in the Dattaka Adoption, adoption under English law completely severs the adoptee's ties in his natural family and replaces these with corresponding ties in the adoptive family (except as to the devolution of entails and estates accompanying a title).[81] But as in the case of Kritrima adoption, under the English law also, unless the adoption is made by two spouses jointly, the adoptee is considered as the child of the person who actually adopts it with all the incidents of inheritance to or through such person, which is not the case in Dattaka adoption wherein adoption by the husband or the widow makes him the child of both spouses.

It may be interesting to note that even in some modern States like France and Uraguay, two different types of adoption are recognised (which are discussed at pp. 164 to 165 above). In some states such as Massachusetts and Virgin Islands of the U.S.A., Tasmania and New Zealand, like the Kritrima adoptee, the adoptive children inherit from the adoptive parent but do not inherit from relatives of the

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81. Refer to the respective provisions discussed in Chapters 2 to 4 above.

adopters.[82]

It would thus be seen that the ancient Hindu law provided a comprehensive method for affiliation of sons and has been rightly praised by Derrett.[83]

The debatable point now is whether it is better to have different methods of affiliating a son with different rights flowing from each mode, or to have one stereo-typed standard form and avoid the confusion arising from the varying effects of the different adoptions. The answer to this question is possibly found in the doctrine of Kalivarjya i.e., practices prohibited in the present Kaliyage. Kane[84] refers to a passage of Bṛihaspati quoted by Aparārka[85] 'where

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82. See pp. 162 and 166 above.

83. Adoption in Hindu Law, by J.D.M. Derrett. (Zeitschrift für Vergle ...), 1957, pp. 34-36. Refer to p. 41 of this thesis.

84. Kane: History of Dharmasastra, Vol. III, p. 926 and Vol. II, p. 603n. 1418. Also Batuknath Bhattacharya: 'The Kalivarjas'.

85. Aparārka p. 97.

Niyoga and the numerous secondary sons are said to be impossible owing to the decadence of spiritual power among men of the Dvāpara and Kali Ages. Apararka p. 739 and the Dattaka Mīmāṁsā quote a passage of Saunaka to the effect that sons other than the Aurasa or dattaka are not allowed in the Kali Age'. The Dattaka Mīmāṁsā is also to the same effect but says that the term 'son given' is inclusive of the son made.[86] I agree with the view that in the present times it is better to have a simple standard form of adoption i.e. the Dattaka rather than a number of different forms of affiliating sons having varying effects which are likely to cause a great deal of confusion.

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86. Datt. Mim. 1, 65.

CHAPTER X

CONCLUSION

1. Are the "effects" provided in the Hindu Adoptions and Maintenance Act 1956 (as at present worked) a departure from the Anglo-Hindu position?

The first question to be considered now is as to the true effect of Sections 12 and 14 of the Hindu Adoptions and Maintenance Act 1956. Section 12 of the Act runs thus:

> An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family:
>
> Provided that -
>
> (a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;
>
> (b) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;
>
> (c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption.

Thus the section mentions four consequences which follow an adoption made under the Act. These consequences and the question as to whether they are a departure from the Anglo-Hindu position are considered below:

(i) Child for all purposes: The section confers on the adoptee the same rights and privileges in the family of the

adopter as the legitimate natural son, except in the case of marriage. By the use of the words "for all purposes" no distinction between a natural and adopted son is made except as mentioned in the provisos to the section. Under the prior Hindu law the adopted son also had generally the same rights as a natural son, except in a case of competition between an adopted son[1] and a subsequently born natural son, in which case the adopted son got a reduced share on partition, his share being different according to the different schools. Thus on partition between an adopted son and an after born natural son, in Bengal he took one-third of the adoptive father's estate, in Benares he took one-fourth and in Bombay and Madras he took one-fifth of the estate. This was the practice which the Courts had built up relying upon the different constructions which the various authorities placed on Vasiṣṭha's text "When a son has been adopted; if a legitimate son be afterwards born, the given son takes a fourth share",[2] and of a text of Kātyāyana.[3] According to some authorities the adopted son is entitled to a quarter share,[4] according to others a third share.[5] There is also a difference of opinion as to whether the fourth or third shares are with reference to the adoptive fathers estate or to the share

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1. For a discussion of this topic refer to Chapter IV of the thesis.
2. Vasiṣṭha XV, 8, 9; Mit. 1, XI, 24.
3. Refer to Chapter IV pages 146 to 147.
4. Mitākṣarā 1, 11, 21 and 25; Dat. Mim. X 1; Vyavahāra Mayūkha p. 60, Mandlik's edition.
5. Dāyabhāga X, 9; Datt. Chand. V, 16-17.

taken by the after-born natural son.[6] If the estate was impartible the natural son alone succeeded to it. Among Sudras, in Madras and Bengal, an adopted son shared equally with an after-born natural son but in Bombay he took only one-fifth. But the Act specifically lays down that now there will be no distinction between an adopted or natural son and now he will be entitled to an equal share. It would appear that the Smriti law giving the natural son greater rights in competition with the other sons seems to be based on the ground that the natural son is superior to the other kinds of sons and therefore deserves greater rights in the father's property as compared to the other kinds of sons.

Under the prior law an adopted son was entitled to re-open partition etc. on the 'principle of relation back'. Section 14 of the Act which deals with the relationship of the adopted child with the spouse of the adopter, is silent on the adoptee's relation with the deceased spouse of the adopter. The Supreme Court has recently decided in the cases of Sawan Ram v Kalawanti[7] and Sitabai v Ram Chandra[8] that on a correct interpretation of the various provisions of the Act especially Sections 5 and 12, the deceased husband of a widow who adopts becomes the adoptive father of the adopted child i.e. that the principle of relation back still stands. The Smritis are silent on the point, but on equitable and other considerations discussed above,[9] I am inclined

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6. For a fuller discussion refer to Chapter IV.

7. A.I.R. 1967 S.C. 1761.

8. A.I.R. 1970 S.C. 343.

9. See pages 322 to 338.

to support the Supreme Court's view-point. For the adoptive son does confer temporal benefit and possibly spiritual benefit also on his deceased adoptive father in continuing the family name and discharging all the duties which a natural son would otherwise have discharged. Besides he sacrifices all his rights in his natural father's family. It would therefore be fair and equitable that he should be given rights in his deceased adoptive father's property.

(ii) Proviso (a): Blodd-relationship for the purpose of marriage continues with the family of birth:-

As under the prior law, so also under the present Act, the adopted child cannot marry a maiden whom he could not have married on account of prohibitions in his family of birth i.e. the Sapinda relations and those relations in the prohibited degree of relationship mentioned in Section 5 of the Hindu Marriage Act, 1955, cannot be taken in marriage. In addition the prohibitions in respect of marriage will operate in the adoptive father's family also. This seems to be a wholesome provision.

(iii) Proviso (b). Non-divesture of Property

This proviso lays down that an adoptee, on his or her adoption will not be divested of any property which might have vested in him or her before the adoption. Under the prior law, according to the Dāyabhāga law, adoption did not divest any property which had vested in the adopted son by inheritance, gift etc. As regards cases governed by the Mitākshara school there was a difference of opinion between the various courts. According to the text of Manu the

adopted son is not to take his father's property into the adoptive family, whether it is already vested in him or not, i.e. the boy given in adoption gives up the natural family and everything connected with it and takes his place in the adoptive family as if he had been born in it, with the result that on adoption the property vested in him would be divested and devolve upon the next heir in the family of his birth. Thus where property had vested in a person as the heir of his father and he is subsequently adopted into another family he would lose his right in the property, in view of the fact that it is 'the estate of his natural father'.[10] But in a later Bombay case it was held that a person does not, on adoption, lose the share which he had already obtained on partition from his natural father and brothers in the family of his birth,[11] on the ground that the share so obtained cannot be said to be the estate of his natural father within the meaning of the text of Manu, because the share obtained on partition becomes one's separate property. But where the boy adopted was a coparcener in the joint family, he was divested of his right in the coparcenary property.

The Madras High Court had held that an adoption did not divest any property which had vested in the adopted son previous to the adoption. Thus where coparcenary property had already vested in a person as the sole surviving coparcener and he is subsequently adopted into another family, he did

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10. Dattatraya Sakharam v Govind Sambhaji (1916) I.L.R. 40 Bom. 429.

11. Mahableshwar Narayan v Subramanya (1923) I.L.R. 47 Bom., 542.

not lose his right in that property.[12] The Calcutta High Court has held, distinguishing in effect the Bombay cases, that under the Dāyabhāga law, a person who is given away in adoption is not divested of the inheritance vested in him.[13] This view has been accepted by the legislators in enacting Proviso (b) to this section. Thus the rule under the Mitakshara was that by virtue of an adoption, his civil death occurs in the natural family and his interest in the Mitakshara coparcenary which is always fluid i.e. subject to alteration by births and deaths in the family, and not vested until partition takes place, passes on to the other coparceners by survivorship. But if he was the sole surviving coparcener, the estate is deemed to be vested in him and he carries it with him to his adoptive family. It is difficult to see how any other solution could have been practical. So also, in so far as his separate property is concerned, the adopted child always carries it with him to his family of adoption.

'Subject to Obligations': The proviso lays down that while the adopted child shall not be divested of any property which might have vested in him prior to his adoption, the adopted child continues to hold the property 'subject to the obligations if any' attached to its ownership. Such obligation includes the obligation to maintain relatives in the family of his or her birth. As to the relatives or dependants who are entitled

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12. Venkat Narsimha v Rangayya (1906) I.L.R. 29 Mad. 437.

13. Shyamcharan v Sricharan (1929) 56 Cal. 1135; Rakhaliraj v Debendra Naik (1948) 52 Cal. W.N. 771.

to maintenance, these are dealt with in Sec. 21 of the Hindu Adoptions and Maintenance Act 1956, together with any others who are entitled by reason of the operation of joint family law, e.g. the widows of a predeceased coparcener who died prior to 1956, or even a predeceased coparcener's concubine.[14]

(iv) Proviso (c)... Non-divesture by adoptee

This topic has been discussed under recent leading cases in Chapter VI. The Smṛiti law is silent on the question whether, when an adoption is made by a widow, the adoption relates back to the death of her deceased husband, so as to make him the adoptive father of the child adopted by the widow for purposes of succession to his property. The Privy Council in the leading case of Anant v Shankar[15] held that when an adoption was made by the widow, such adoption 'related back' to the death of her deceased husband and that the adopted son could divest the father's property vested in other heirs and also question alienations made in excess of her powers by the widow and other heirs between the death of the deceased adoptive father and the adoption of the son by the widow. This legal proposition was disapproved of and modified by the Supreme Court in Shrinivas v Narayan[16] wherein it was laid down that the relation-back theory applied only with respect to the property (separate or share in joint family property) of the deceased adoptive father but when succession to the properties of a person other than the

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14. This somewhat complex topic is outside our present scope but is fully explained in A. Rajagopal v A. Sitharamammabai A.I.R. 1965 S.C. 1970.

15. [1944] I.L.R. Bom. 116 (P.C.).

16. A.I.R. 1954 S.C. 379.

adoptive father was involved, the principle applicable was not the rule of relation back but the rule that inheritance once vested could not be divested.

The Hindu Adoption and Maintenance Act 1956 is silent about the relationship of the adopted child with the deceased spouse of the adopter. But the Supreme Court has held in Sawan Ram v Kalawanti[7] and Sitabai v Ram Chandra[8] that the relation back theory has not been abolished by the Act. Their Lordships of the Supreme Court observed in Sawan Ram v Kalawanti[7] that by Clause (c) of the proviso to Section 12 of the Act viz. 'the adopted child shall not divest any person of any estate which vested in him or her before the adoption', the Act had narrowed down the rights of an adopted child as compared with the rights of a child born posthumously and that this restriction on the rights of the adopted child cannot lead to any inference that a child adopted by a widow will not be deemed to be the adopted son of the deceased husband.

Also in view of Sections 5 and 12 their Lordships in the two Supreme Court cases[7, 8] held that the deceased husband of the widow becomes the adoptive father of the adopted child i.e. that the principle of relation back stands. These decisions have been criticised by Mr. Dabke and others which are discussed in the latter part of Chapter VI.

As already mentioned above, I think that the Supreme Court decisions upholding the 'relation back' theory are correct. For Section 4 of the Act in effect lays down that in respect of any matter for which no provision is made in the Act, the old law stands. Also it seems equitable that the child adopted by the widow be given rights in his

deceased father's property, as such child does confer benefits, temporal and spiritual on the deceased adoptive father i.e., in continuing the family name and discharging all the functions which a natural son would have discharged including the performance of 'Śrāddha' etc. Besides the adopted child sacrifices all his rights and benefits in his natural family (which can seldom be calculated or visualised accurately at the time of his adoption) and is therefore entitled to get similar rights in the adoptive family which obviously includes the most important right to succeed to the property of his deceased adoptive father.

The suggestion, which learned writers and even Ramamurti, J.,(in Arumugha v Valliammal A.I.R. 1969 Mad. 72) have made, viz. that the adoptee should rest content with whatever his adopting mother gives or bequeathes to him, is unrealistic. Widows inherit, on an intestacy, only a fraction of the estate in competition with the mother, the daughter, a predeceased son's daughter and some other descendents; and in India women are mostly confined to the home, are seldom great earners, and invest what little they have in unproductive jewellery.

In order to clarify the meaning of Section 12(c), I would suggest that Section 12(c) be suitably amended engrafting an exception to the rule laid down therein and incorporating the law enunciated by the Supreme Court in Krishnamurthy v Dhruwaraj[17] i.e. that so long as the widow in the family existed and was capable of adopting a son who

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17. See Chapter VI page 333 above.

becomes a coparcener, the fact that a person inherited the property of his father (or father's father) absolutely did not change the character of the property from coparcenary property to self-acquired property of such person. I have incorporated this suggestion under the subsequent title "specific recommendations for the Adoption Code".

2. Is the current law "Hindu" in any significant sense?

As mentioned at the beginning of this thesis the primary sources of 'true' Hindu law are the Śrutis and Smṛitis,[18] which have been compiled on the basis of the revelation of the divine law to the holy rishis. The function of these authorities, according to the Hindu theologians, is to impart knowledge which could not be obtained from other sources i.e., on the 'Adṛiṣṭa' principle, discussed above,[19] and any rule of law which goes against the injunctions laid down by the Śruti and Smṛitis is, according to the Mīmāṁsakas, to be rejected. It is only where the Smṛitis are silent that the correct law could be deduced by the application of equitable considerations.

In some instances the provisions of the Hindu Adoptions and Maintenance Act 1956 are directly opposed to the Smriti injunctions. For instance, a text of Vasiṣṭha specifically provides "Man formed of virile seed and uterine blood is an effect whereof the mother and the father are the cause: the mother and the father have the power to give, to

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18. See p. 27 et seq., of Chapter I.

19. See pp. 66 to 69 of Chapter II.

sell, (and) to abandon him",[20] but Section 9 of the Act allows even the guardian of a child to give the child away in adoption.

Also the Smritis lay down that in competition with a legitimate son born to the adopting father after adoption, the adopted son takes a reduced share as compared to the share of the after-born Aurasa son,[21] possibly because the Aurasa legitimate son is obviously superior to the other kinds of sons, but S. 12 of the Act gives the adopted son equal rights with an after-born Aurasa son.

Again while the divine Rishis emphasize that a rule opposed to the Smritis should be disregarded, Section 5(1) of the Hindu Adoption and Maintenance Act 1956 lays down "No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this Chapter, and any adoption made in contravention of the said provision shall be void", and also Section 4 lays down "Save as otherwise expressly provided in this Act, - (a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act; (b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the

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20. See Kapur's Hindu Law of Adoption p. 643.

21. See translation of Vasistha's text on p. 644, Kapur's Hindu Law of Adoption to the effect "After his (the adopted son's) adoption if a real legitimate son is born, then the dattaka is a participator in a fourth share".

provisions contained in this Act".

On several other points, however, on which the Smritis are silent the provisions of the Act seem to be quite equitable and sound in settling disputed questions of law i.e. on the question whether the adoption of daughters is valid and on the capacity of a widow to adopt without the husband's specific permission, I am inclined to agree with the deductions arrived at by the framers of the Act on these points for reasons already discussed by me on pages 69 to 75 and pages 242 ff.

The Courts in India have interpreted the provisions of the Act as an amendment and a continuation of Hindu law, for example in Sawan Ram v Kalawanti[22] and recently in Sitabai v Ramchandra[23] the Supreme Court have held that the 'relation back' theory of prior Hindu law still holds good on the correct interpretation of Sections 5 and 12 of the Act, even though Section 14 of the Act is silent on the relationship of the adopted child with the deceased spouse of the adopter. Also Section 4 of the Act lays down in effect that on the points on which provisions of the Act are silent, the old Hindu law stands. In other words, though the law under the Hindu Adoptions and Maintenance Act 1956 cannot be described as 'truly' Hindu, it may however be still said to be Hindu law in many significant senses. We should be on firmer ground if we were able to ascertain precisely what role was played by royal regulation in the practical administration of the Hindu law prior to the British period. Since

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22. A.I.R. 1967 S.C. 1761.

23. A.I.R. 1970 S.C. 343.

this subject is as yet not sufficiently worked out, and is subject to academic conjecture, I am bound to leave the question at this point. But I may be permitted to comment that there is no evidence that 'Hindu' means 'consistent with the dhamaśāstra' or ever meant that. The relationship between the dharmaśāstra and custom was always more complex, and retained within the concept of 'Hinduness' many elements unrecognised in the śāstra.[24]

3. In what respects does it differ from the corresponding English law? In what respects is it nearer to English law than to some foreign systems?

This question has already been dealt with under different heads in the various Chapters of this thesis and is briefly summarised below.

As rightly observed by Derrett no other system better resembles the Hindu law of adoption, in so far as the effects of the Institution are concerned, than the English law; and

> "although, curiously, both an English judge and a bench of Indian judges agreed independently that adoption in India (i.e., amongst Hindus) and adoption in England were poles apart, yet the similarities, judged comparatively, are more striking than the differences, however important the latter may be".[25]

Considering first the differences between the two systems of law, they differ first in the object of adoption.

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24. Derrett, Religion, Law and the State in India (London, 1968), Ch. 6.

25. Derrett: Conflict of Laws: Adoption and a difficult Bombay decision, (1956) 58 Bom. L.R., 33 et seq.

Under the Hindu system the object of adoption is two-fold viz., a temporal one for the continuity of the family in this world and the other a spiritual one for the attainment of heaven, as, according to the Śāstras one cannot attain heaven unless he has a son (which includes an adopted son).[26] Under the English law, the governing consideration of an adoption is the welfare and happiness of the adopted child, and, as an English authority on adoption has said "an adoption brings the homeless child to the childless home".[27] In both systems the mutual temporal benefit to the adopter and adoptee seems to be a common object although in the English law the primary consideration is the welfare of the child. Also the element of spiritual benefit as a consideration for the adoption is absent is the English law, although this is an important motive for adoption among the Hindus. (Ch. I).

There are also other differences e.g., under the Smriti law the adopted son got a smaller share in the adoptive father's property in competition with an after-born natural son. Under the present English law he gets equal rights with the natural sons with the exception that Section 16(3) of the Adoption Act 1958 expressly excludes the devolution of entails and estates accompanying a title as well as the title itself on the adopted son. Under the Hindu Adoptions and Maintenance Act, however, the adopted son now shares equally with the after born natural son (as under the English law).

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26. For a discussion of this refer to Ch. I, pages 4 to 7.

27. See also Chapter I, pp. 7 to 11.

Also under the Hindu Law there is no restriction in respect of devolution of titles and entails and estates accompanying it as the adopted child is considered as a "child for all purposes". (Chapters III and IV) just like a natural son.

Under the old Hindu Law an adoption by a husband, made the adoptee the son of his wife but under the Hindu Adoption Statute the consent of the wife, if living, is essential.[27a] Also under the Hindu Law an adoption by a widow makes the adoptee a son of his deceased adoptive father from the date of the latter's death.[22,25] Under the English law, for the adoptee to become the child of both the spouses, joint adoption by the two spouses is essential.[28] Again under Hindu law the adopted son acquires vested interests in the joint family property equal to the interest of his adoptive father and the Latter's right to dispose of such property is restricted on his adopting the child. Under the English law, adoption does not restrict the right of the adopter to dispose of his property.

Also the 'relation back' theory discussed in Chapter VI is peculiar to Hindu law and has no counterpart under the English law.

The English and Hindu law however agree in several very important aspects. Thus an adoption has the effect (with certain minor exceptions mentioned above) of completely severing the adopted child from the natural family and completely substituting him in the adoptive family. The adoption also creates prohibited degrees of consanguity

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27a. See also article by G.V. Narasimham: Adoption by a male Hindu; (1962) 2 S.C.J., J., 74 and also (1962) 2 M.L.J. 56.

28. See Sec. 1(2), (3) and Sec. 13(2), (3) of the Adoption Act, 1958.

between the adopter and the adoptee for purposes of marriage under both systems.

Also the adopted child inherits not only the properties of the adoptive parents but the property of their collateral relations as well, in the same manner as a natural child of the adopter would be entitled to.[29] In the case of many other countries the laws of inheritance are not as strictly logical as could be seen from a perusal of the discussion in Chapter III pages 161 to 169.

4. Is there any lesson to be learnt from (a) the Hindu and (b) the English law of adoption for those who would draft a new family law for India?

The Vedas declare "Whatever Manu says is medicine for mankind".[30] The Smriti law has been the chief guiding factor in India on the law of adoption since pre-historic times and has most successfully stood the test of time over the past several thousands of years. The provisions of the Smriti law relating to adoptions are, in theory and practice, equally for the benefit of the adoptive father as well as for the adopted child.

Adoption under the English law is treated as one of the best alternatives for improving the lot of the deprived child, though undoubtedly it confers benefit and brings happiness to the childless family as well.

In India only the Hindus can adopt and communities other than Hindus such as the Christians, Parsis, Muslims

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29. See Chapter V pages 224 to 231.

30. Taittiriya Samhita (II, 2.10.2) referred to in Kane: History of Dharmasastra, Vol. I, p. 136.

etc. cannot make a valid legal adoption because of the general absence of a law, statutory or otherwise, recognising adoptions among these communities. The institution of adoption would undoubtedly be a panacea for several thousands of families belonging to all communities who may be in distress on account of childlessness, and legal recognition of this institution for all communities in India, would, I am sure, undoubtedly be welcomed and taken advantage of, by the families in distress. Although initially there could possibly be some opposition by members of some communities who may themselves not be in the distress of childlessness and who may not be able to comprehend the usefulness of the institution; but once the law stood enacted, I have absolutely no doubt that these very persons if in distress on account of childlessness would take advantage of the law and in due course the provisions of the code would prove to be a boon to many families.

It must also be remembered that the modern trend is opposed to the institution of polygamy and in favour of monogamy. Monogamy is the rule amongst Christians, Parsis and Hindus (by the recent Hindu law of Marriage 1955 which abolished Polygamy in 1955). Among the Muslims in India, although polygamy still prevails, the reforms in favour of monogamy in other Islamic countries including Pakistan could well be a pointer to a hope that in the not too distant future the Muslim law in India may also be reformed in favour of monogamy. With the abolition of Polygamy, childless families will become less uncommon and the need for the institution of adoption will increasingly be felt among the communities where adoption is not yet legally recognised.

The English law has, by the recent enactments, unconsciously been brought into the closest analogy with the Hindu law of adoption, and resembles it, especially in so far as the effects of the institution are concerned. As the Smṛiti law has stood the test of time in India for several thousands of years, I would suggest that the future adoption code should have its roots in the Smṛiti law. Where modifications are necessary, or on points on which the Smṛitis are silent, the provisions of English law which are based on considerations of equity and the welfare of the child could be adopted with any suitable modifications that may be necessary to suit Indian conditions.

5. Specific recommendations for the Adoption Code.

The provisions of the Smṛitis are authoritative, equitable and sound and have been the basis of the Law of Adoption in India since time immemorial. As such the Adoption Code should have its roots in the Smṛiti law of adoption, with necessary modifications as suggested above in the last paragraph.

At present, adoption is a legally valid institution only among the Hindus in India, who regard it as an institution for securing spiritual as well as temporal benefit and the popular form of adoption is the "Dattaka" form. Among the Hindus adoption is not only for secular benefit but to fulfil the religious direction that a sonless person is likely to lose heaven unless he secures a substitute son by adoption. Among the communities other than Hindus e.g., the Christians,

Parsis, Muslims etc. adoption, with its necessary legal consequences is unknown.

Although I would prefer a uniform Code for all the communities in India embodying the dattaka adoption or modified dattaka adoption (which could include the adoption of forsaken and other children as suggested below), if circumstances and practicability so demand, i.e. if certain sections of the people wish to adopt only for secular purposes or for the welfare of forsaken children etc., then in the early experimental stages we may have two kinds of adoptions recognised in India viz., 'the Dattaka adoption' and 'the secular adoption', with very slight differences in their effects as suggested below. As the differences between the effects would not be much, once all the communities in India became used to adoption, a single Uniform Code of adoption, making use of the result of a sufficiently long experience of adoption by the various communities, could be drafted. As the Dattaka adoption has its roots and owes its origin and sanction to the Smriti law, it should obviously be governed by Smriti law. But there are many points on which the Smriti law is silent and on such points India can well borrow provisions from elsewhere, e.g. the English law. As already pointed out by me at pages 69 to 75 above, though the Smritis are silent on adoption of daughters, the Puranic instances quoted by me and the fact that adoption of daughters confers a spiritual benefit on the adopter i.e. the benefit which could be derived from such adopted daughter's son, I am entirely in agreement with the provisions of the Hindu Adoptions Act recognising adoption of daughters. Also on account of reasons stated by me at pages 242 ff.

I also agree with the provisions of the Act wherein a widow can adopt without the husband's specific permission.

As to the provision of Section 9 of the Act allowing the guardian of a child to give in adoption this provision appears, on the fact of it, to be opposed to Vasiṣṭha's text[20] wherein Vasiṣṭha directs that only the natural parents and none others have the power to give in adoption (i.e. in the Dattaka adoption). It is true that only the parents of the child have the best interests of their children at heart and by allowing the guardian of a child to give in adoption, whose aim may rather be to get rid of the child ~~rather~~ than for his welfare, such adoptions could turn out to be against the interests of the child. However since the Act abolishes the other forms of adoption and 'the Dattaka form' of adoption as envisaged by the Act appears to be a more comprehensive form than the 'technical Dattaka', I think that forsaken children and orphans in extreme distress, may be allowed to be adopted provided a competent court, after very carefully scrutinizing the circumstances of the child and after being absolutely convinced that the adoption would be for the benefit and welfare of the child, makes the order. However in case two kinds of adoption i.e. the Dattaka and the secular form of adoptions, as suggested below are adopted, then provision could be made for adoption of orphans, forsaken children etc. (provided a competent Court considers the adoption to be in the best interests of the child) in the secular form of adoption rather than the Dattaka form in view of the text of Vasiṣṭha[20] mentioned above.

As to whether other than childless couples should

adopt, I think the criterion laid down by Manu that adoption may be resorted to in case of 'distress' should be adopted. So that if a child be in distress (e.g. in the case of forsaken and other children) and a couple even though not childless adopts it, then such an adoption should be upheld, and in such cases it should be provided that a Court order would be necessary, and a competent Court would make the order only if the adoption is for the benefit and welfare of the child. In this case also the adoption may have to be in the secular form as suggested above.

The story of Śunaḥśepa in the Aitareya Brahmaṇa (33) shows that this adoption by Viśvāmitra, when the former was in distress, was regarded as valid even though Viśvāmitra had a hundred and one sons of his own living at that time.[31] Śunaḥśepa became a great Vedic sage and composed several Vedic Stotras and is referred to therein as 'Śunaḥśepa, the son of Viśvāmitra'. Some such kind of provision (enabling a man with a son to adopt a son) may be necessary in view of the abolition of the Kṛitrima and other forms of adoption by the Act.

The Act is silent on the question whether, when an adoption is made by a widow, the adoption 'relates back' to

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31. See Kane: History of Dharmaśastra (1946) Vol. III, p. 663.
Śunaḥśepa was sold by his natural father to be used as a substitute for a sacrifice to the gods. When later the gods released him, Śunaḥśepa refused to go back to his natural father but willingly became the adopted son of Viśvamitra when the latter offered to adopt him. (This appears to have been an adoption of a type classified in Smṛiti as swayamdatta not dattaka).

the death of his adoptive father entitling him to claim the deceased adoptive father's property and displacing the inferior heirs who might have inherited the property in the meanwhile. I have already discussed this topic in Chapter VI and elsewhere and also referred to the recent Supreme Court decisions[22, 23] affirming that relation back still stands. As already explained I think the doctrine of 'relation back' is an equitable doctrine; for the adopted son sacrifices everything in his natural family and does confer benefit on his deceased adoptive father by continuing his line, and discharging all the functions which a natural son would have discharged. Also usually the only substantial property which an adopted child could claim is that of the deceased adoptive father's, and considering the sacrifices he makes and the benefits he confers, I think that a provision specifically recognising the 'relation back', of the son adopted by a widow, to the death of his adoptive father should be clearly incorporated.

Also as a consequence of this, the proviso in Section 12(c) would have to be suitably amended to avoid any confusion and ambiguity i.e., an exception to the rule in Section 12(c) could be laid down to the effect that, so long as the widow of the family existed and was capable of adopting a child, such adoption would be deemed to 'relate back' to the death of the deceased father thus making such deceased father the adoptive father of the adopted child for the purposes of inheritance to such deceased father's property.

As for the 'Secular Adoptions', provision should be made allowing the member of any community in India viz., Christian, Parsi, Muslim or even Hindu etc., to adopt

according to this form.

Such adoptions should be effected only by means of a proper Court order, which the proper Court should pass after satisfying itself that the adoption is in the best interests of and for the welfare and benefit of the adopted child. In this respect the procedures followed in English adoptions with necessary modifications to suit Indian conditions could be followed. A suggestion for 'an Adoption of Children Bill' has been drafted by Mr. Dhurandhar, formerly Legal Remembrancer of Bombay State and prepared by Meher K. Master, a member of the Indian Federation of Women Lawyers Conference for the Indian Conference of Social Work, Bombay. The draft is useful as a step in the direction of codification of the law of adoption for the benefit of all communities in India.

In case of secular adoptions, many of the equitable provisions of English law could be borrowed, for apart from the provisions in English law being equitable and in the interests of children, the English law of adoption is closest to the Hindu law of adoption especially in its effects. Thus as under the English law, the adoptee under this form of adoption will be deemed to be the adopted child of the adopting parent only and entitled to inherit the property of such parent and his or her relations. But in case of joint adoptions (which should be permissible only when the adoption is by the two spouses) the adopter would become the child of both the parents with the usual effects of having the right to inherit to their properties and those of their relations as in the case of a natural son. In this type of adoption multiple adoptions may be permitted on the ground of distress of the child etc., as suggested above, when a competent

Court is satisfied that such adoptions would be in the interest of the child. Also I agree with the provisions in the Hindu Adoptions and Maintenance Act in creating prohibited relationships for purposes of marriage in the adoptive family as if such child were a natural son and also maintaining the prohibited relationships in the natural family. This is a wholesome provision. As to the provision whether there should be 21 years difference of age when the adopter and adoptee are of different sexes I think this may be modified by adding a proviso permitting such adoptions when the age difference is less than 21 years, if permission is granted by a competent Court, which may grant or refuse permission considering the circumstances and merits of the individual cases. For in the past, widows in their teens have adopted sons which have worked most successfully. A case may well arise when a widow of 18 years has an opportunity to adopt a new born baby, which opportunity she may lose on account of this provision and in such and similar circumstances the Court should allow the adoption.

So also the adoption should have the effect of completely severing the adopted child from the natural family and creating similar ties in the adoptive family with rights of succession in the adoptive family including the right to succeed to the relations of the adopting parent, provided that the adopted son would not be entitled to marry prohibited relations in either families. In other words the effects in the 'secular adoption' would be similar to the Dattaka and English adoptions except that the adoption would not 'relate back' to the death of the adopter's spouse,[31a] as the adoption

31a. 'Relation back' will not occur in non-sacramental adoptions This point has been overlooked by almost all writers on Modern Hindu Law except J.D.M. Derrett. See P.376 note 232c.

would be only to the parent or parents actually adopting and except for some other minor differences i.e. allowing adoptions of orphans and multiple adoptions in the case of children in distress etc. Also the provision in English law (Section 16(3) of adoption Act 1958) expressly excluding the devolution of entails and estates accompanying a title as well the title itself on the adopted son need not be adopted as it is inequitable and against the interests of the adopted child. However entails do not exist in India. Titles as such are more or less insignificant now that the privy purses are or may be abolished. The detailed provisions relating to the Adoption Code could be drafted by the Ministry of Law, Legislative Dept., in consultation with the State Government.

Meher K. Master in a paper for the Indian Federation of Women Lawyers Conference at Bangalore (1st to 2nd June 1968) on "The Indian Adoption of Children Act in the making", observes (at p. 5)

> "In recent years there has been a growing demand for a general law of adoption in India. The basis of this demand lies imbedded in the Constitution itself. Thus Clause (f) of article 39 of the Constitution requires the state to direct its policy towards securing that childhood and youth are protected against exploitation and against moral and material abandonment".

I fully endorse these views and consider that the time is now ripe for enacting an Adoption Code on the lines which I have suggested above.

Recommendation:

The substance of my recommendation is that there

should be, for a period, a two-fold legal institution of Adoption, one based upon the Sastra and available only to Hindus, and another of a purely secular kind, available to all persons subject to Indian law in this regard. It would not be necessary to tamper with customary law, to the extent that that has survived the legislation of 1956 which we have already discussed exhaustively. The merit of this recommendation would, I should submit, be that, without discarding any advantage of the traditional law, it would confirm and extend the utilitarian aspects of Adoption where these are needed. A two-tier system of marriage and divorce is already in existence in India. The Special Marriage Act of 1954 provides a purely secualr system of marriage and divorce and this has been extended to persons marrying abroad, under the Foreign Marriage Act of 1969. Alongside this secular marriage there is the Hindu marriage confirmed by the Hindu Marriage Act of 1955 subject to certain modifications of a secular appearance. The possibility of a further amendment of Indian law, whereby all personal laws of marriage might be merged in a common religious system, while all communities might be held to have married within the scope of a common secular system unles they register themselves under the religious system, has been suggested by Derrett. The discussion of this proposal is not within my scope.

Derrett, in his Critique of Modern Hindu Law, (Bombay, Tripathi, 1970)[31b] does not recommend the enactment of a secular adoption law, but he points out that the fears which learned authors had shown, that the introduction of new

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31b. Para. 184. Also see Paras 174 to 186 and the Chapter on Adoption (pp. 122 to 144).

elements into the Hindu adoption law in 1956 would create hopeless anomalies unless 'relation back' were held to have been totally abolished by that statute, were not justified, since the new law has created a series of secular effects alongside the 'sacramental' effects of an orthodox Hindu adoption, both co-existing as effects under the name of Hindu adoption law. I should submit that this indirectly supports my contention that an avowedly non-sacramental adoption law for all Indians is desirable. It would tend to make the intellectual position much clearer, and would avoid the confusion from which Hindus in India will otherwise suffer.[32]

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32. The judiciary realise that the Hindu public do not understand the new laws. More or less technical failures occur, and unsuccessful litigants' predicament is sympathetically considered when it comes to an order for costs. See per Deshmukh, J., at Govindram Mithamal Sindhi v Chetumal (1969) 72 Bom. L.R. 653.

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Achyuta: A commentary on the Dāyabhāga Edited by J.S. Siromani Bhattacharya, Calcutta, 1863.

Adoption of Children: Working paper containing the provisional proposals of the Departmental Committee on the Adoption of Children, London, 1970.

Aiyangar, P. Duraiswami: Adoption - Divesting of Estate (1956) 69 Law Weekly. 29 - 33.

Ance, L.M. L'Adoption dans les legislations Modernes, Paris, 1943.

Anderson: Family Law in Asia and Africa. Published by George Allen and Unwin Ltd., 1968 (Derrett's article on Family arrangements in India).

Anegundi, S.V.: Bhimabai v. Gurunathgouda and After: [1933] 35 Bom. L.R. (J) 60.

Anonymous article (purported to be written by Sir Bhashyam Ayyangar): Adoptive Mother [1899] 9 M.L.J. 231.

Aparārka: A commentary on the Yājñavalkyasmṛiti. (Anandasrama Press edition) Vols. I and II, Poona 1903.

Āpastamba: Dharmasūtras, Kashi Sanskrit Series, Benares, 1932.

Ayyar, A.S. Nataraja - Mīmāṁsa Jurisprudence (Ganga Natha Jha Research Institute Series No. 2, 1952.

Ayyar, Sir P.S. Sivaswamy: The Evolution of Hindu Moral Ideals (Kamala Lectures, 1935, Cal. Univ.).

Baade, H.W.: Inter-state and foreign adoptions in North Carolina (1962) 4 O.N.C.L. Rev. 691.

Banerjee, G.D.: Hindu Law of Marriage and Stridhana (3rd edn.) Calcutta.

Baudhāyana: Baudhāyanadharmasūtra (Anandāsrama Press edition), Poona, 1905.

Beale, Prof.: Restatement of the Law of Conflict of Laws, St. Paul (1934).

Bhate, K.D.: Third Party's claim and some problems, [1963] 65 Bom. L.R. (J) 65.

Bhattacharya Batuknath: The Kalivarjas, Calcutta, 1943.

Bhattacharya, Jogendra Nath: Commentaries on Hindu Law (3rd edn. Cal. 1909).

Bhattacharya, P.: Hindu Law of Adoption [1961] 2 S.C.J., J, 57.

Bromley: Family Law (3rd edn).

Campbell, Prof.: The Law of Adoption in New Zealand, Wellington (1952).

Capoor, V.N.: Unmarried daughter's rights in Father's property under Hindu Law A.I.R. 1966 (J) pp. 63 to 65.

Chandesvara: Vivadaratnakara. Bibliotheca Indica series, Calcutta, 1887.

Chaudhari, D.H.: Hindu Adoptions and Maintenance Act, 1956; Calcutta, 1957.

Chaudhari, D.H.: The Hindu Marriage Act 1955; Cal. 1957

Chaudhari, D.H.: Special Marriage Act 1954, 2nd edition, Cal. 1958.

Cheshire: Private International Law, 8th edn.

Clyde Report (for Scotland): Committee on Homeless Children (Scotland) Report Cmd. 6911, 42.

Colebrooke, H.T.: A Digest of Hindu Law (3 Vols. Cal 1801).

Colebrooke, H.T. : Two treatises on the Hindu Law of Inheritance (Calcutta Cal. 1810).

Corbib, Prof.: Contracts for the benefit of third persons (1930) 46 L.Q.R. 12 and (1933) 49 L.Q.R. 474.

Cowell, H.: The Hindu Law (Calcutta) 1871 - T.L.L. 1871.

Cowen, Z.: English Law and Foreign Adoptions (1963) 12 Int. and Comp. L.Q. 168-74.

Curtis Report of 1946: Care of Children Committee Report 1946, Cmd. 6922.

Dabke, G.K.: Divesting of Estate on Adoption (1939) 41 Bom. L.R. J, 41.

Dabke, G.K.: Divesting on adoption, [Nov. 1968] 70 Bom. L.R. (J) 143-148.

Dabke, G.K.: Note on Sitabai v. Ramchandra, A.I.R. 1970 Aug. (J), pages 99 to 101.

Dabke, G.K.: Termination of Widow's power to adopt (1953) 55 Bom. L.R., J, 57

Dabke, G.K.: The little word "To" in S. 5(1) of the Hindu Adoptions and Maintenance Act 1956; [1969] 71 Bom. L.R., J., 13.

Dattaka Chandrikā (Anandasrama Press edition).

Dattaka Mīmāṁsā (Anandasrama Press edition).

Derrett, J.D.M.: Adoption and Relation Back: The position in 1971. [1971] 73 Bom. L.R. (J) 31-35.

Derrett, J.D.M.: Adoption: A Preliminary study: S.O.A.S. Estudio preliminar Sobre la adopcion: Instituto de Derecho comparado: Barcelona, 1956.

Derrett, J.D.M.: Adoption by a daughter-in-law and divesting (1964) 1 M.L.J. (J) 3 ff.

Derrett, J.D.M.: Adoption in Aliyasanthana Law. An Illustration of the relation between custom and Law. [1956] 2 M.L.J., (J) 97 ff.

Derrett, J.D.M.: Adoption in Hindu Law: Zeitschrift für vergle. R. 60 (1957), 34 to 90.

Derrett, J.D.M.: Adoption in the Joint Hindu family: A recent Supreme Court decision and its limits [1968] 70 Bom. L.R. (J) 51-55.

Derrett, J.D.M.: Adoption, succession and the present state of Hindu Law April [1966] 68 Bom. L.R. (J) p. 41 ff.

Derrett, J.D.M.: An Important Development in the Law of Adoption [1955] 57 Bom. L.R. (J) 73.

Derrett, J.D.M.: Conflict of Laws: Adoption and a difficult Bombay decision (1956) 58 Bom. L.R. pp. 33 to 41.

Derrett, J.D.M.: Critique of Modern Hindu Law (Bombay, Tripathi, 1970).

Derrett, J.D.M.: Divesting: An important full bench decision on adoption [1956] 58 Bom. L.R. (J). 1

Derrett, J.D.M.: Divesting by an adopted son: A pressing problem for the Supreme Court [1960] 23 S.C.J. (J) pp. 43 to 57.

Derrett, J.D.M.: Estate duty and the nature of a Mitakshara coparcener's interest; (1958) 60 Bom. L.R. (J.) 161 to 172.

Derrett, J.D.M.: Family Arrangements; [1968] 70 Bom. L.R., J. 1.

Derrett, J.D.M.: Five Doubtful Cases in Hindu Law from Madras, 1963 1 M.L.J.,J., 1, 13 ff.

Derrett, J.D.M.: Hindu Law: Adoptive Mothers: Another difficult problem for the Supreme Court; [1955] 18 S.C.J. (J) 217 ff.

Derrett, J.D.M.: Hindu Law Past and Present, Calcutta 1957.

Derrett, J.D.M.: Inheritance by, from and through Illegitimates at Hindu Law; [1955] 57 Bom. L.R., J., 1 ff.

Derrett, J.D.M.: Introduction to Modern Hindu Law (1963 edn., Oxford University Press).

Derrett, J.D.M.: More about Illegitimacy at Hindu Law; [1955] 57 Bom. L.R., J., 89 ff.

Derrett, J.D.M.: Private International Law and Personal laws (1965) 14 I.C.L.Q. 1370-1375.

Derrett, J.D.M.: Recent Decisions and some queries in Hindu Law - 8 Divesting by an Adopted Son; [1960] 62 Bom. L.R., J, 31-32.

Derrett, J.D.M.: Renunciation: An essay in Anglo-Hindu Law. [1965] 67 Bom. L.R. (J) 167.

Derrett, J.D.M.: "Sarvasvadanam Marriage" and the Rights of Children born of it. [1967] K.L.T., J, 63-66.

Derrett, J.D.M.: Religion, Law and the State of India, Faber & Faber) London, 1968.

Derrett, J.D.M.: Two Difficult Bombay Cases in Hindu Law [1956] 58 Bom. L.R., J., 97.

Derrett, J.D.M.: Recent Decisions and some queries in Hindu Law: 1 Adoption, [1957] 59 Bom. L.R. J., 178-182.

Derrett, J.D.M.: Some Troublesome Case in Adoption [1953] 55 Bom. L.R.J.I.

Devannabhatta: Smritishandrikā, Mysore 1916 and 1918. Also Gharpure's ed. Bombay, 1918.

Dicey and Morris: Conflict of Laws 8th edn. by J.H.C. Morris and specialist editors.

Diwan, Paras: Article criticising Sawan Ram's case; (1969) 21 Law Review (Punjab) pp. i-xviii.

Driver and Miles: Assyrian Laws, Oxford 1935.

Driver amd Miles: The Babylonian Laws, Oxford 1952.

E.J.P.: Note on Privity of Contract, (1954) 70 L.Q.R. 467.

Elhence, Ved Prakash: Widow's Power of Adoption A.I.R. 1956 (J) 57.

Ellis, T.P.: Notes on Punjab Custom (1921 Edn.).

Fatherless by Law (Published by Church Information Office, Westminster) Cowley, Oxford 1966.

Foulkes, Thomas: The Hindu Law of Inheritance according to the Sarasvatī-vilāsa (London 1881) (Translation from the original Sanskrit).

Gautama: Dharmasūtras. Government Oriental Library series, Mysore, 1917.

Ghose, J.C.: The Principles of Hindu Law (Vols. I & II, 1917, Vol. III, 1919).

Gibelin, E.: Etudes sur le droit civil des Hindous, Pondicherry 1847.

Gloag and Henderson: Introduction to the law of Scotland (Seventh edn. 1969).

Gonsalves, Luis da cunha: Direito Hindu e Mahometano (Coimbra 1923).

Goodrich: Yhe Conflict of Laws, 4th edn.

Gour, Sir Hari Singh: The Hindu Code; 4th edn. Nagpur, 1938.

Govindaraja: A commentary on the Manusmriti. Mandlik's ed. Bombay, 1886.

Graveson, R.H.: The Conflict of Laws; 6th edn. 1969.

Gujarathi, Haridas: Adoption by a Hindu widow after 21st Dec. 1956; A.I.R. 1966 Journal 19.

Gupte, S.V.: Hindu Law in British India (2nd edn. and Supplement) N.M. Tripathi, Bombay 1947.

Gupte, S.V.: The Hindu Adoption and Maintenance Act, 1956. (Bombay, Tripathi, 1971.)

Hague Conference on Private International Law (1964): draft Convention on Adoption; (1965) 14 I.C.L.Q: 558 ff.

Hansa, Rita B.: Adoption and Religious Control; (1968) 54 A.B.A.J. 771.

Hurst Report (1954): Report of the Departmental Committee on the Adoption of Children, published by H.M.S.O., London.

Inner Temple: Bhimabai v. Gurunathgouda [1934] 36 Bom. L.R. (J) 1.

Iyer, Sundara: Malabar Law (1922) edn.

Iyer, V.N. Subramanya: Hindu Law, 1952.

Jaiswal, R.C.: Contracts for the benefit of Third persons, [1968] 2 M.L.J. (J) 73-82.

James, T.E.: Children and the Law (Pergamon Press Ltd.), First edition 1965.

Jamieson, Dr.: Chinese Family and Commercial Law, 1921.

Jha, Ganganatha: Hindu Law in its sources, All. 1933. Vols. I and II.

Jha, Ganganatha: Manu Smriti (with the Manubhāsya of Medhātithi) Calcutta 1932-1939.

Jha, Ganganatha: Pūrva Mīmāṁsā in its sources, 1942 Benares.

Jimūtavāhana: Dāyabhāga Ed. by B.C. Siromani Bhattacharya Calcutta 1863.

Jolly, J.: Nāradasmriti (including Asahāya), Calcutta 1885.

Jolly,J.: Outlines of an history of Hindu Law: Tagore Law Lectures of 1882, Calcutta, 1885.

Jones, Sir William: Translation of Mānava Dharma Sāstra edited by G.C. Haughton, Cal. 1888.

Jones, Sir William's works edited by Lord Teignmouth, London, 1807.

Josling, J.F.: Adoption of Children (Solicitors Law Stationery Society Ltd., 3rd Edn. London, 1953).

Kamalakara: Nirnayasindhu Chowkhamba Sanskrit series Vols. I and II, Benares 1924-1930.

Kane, P.V.: Bhimabai v. Gurunathgouda and Amarendra Mansingh v. Sanatan Singh [1934] 36 Bom. L.R. (J). 12.

Kane, P.V.: History of Dharmasāstra (Poona 1946) Vols. I to III.

Kapur, J.L.: The Law of Adoption in India and Burma, (Calcutta 1933: Supplement 1936).

Kashinatha: Dharmasindhu Nirnayasagara edn. 1936.

Kautilya: Arthasāstra, Shama Sastri's ed. Mysore, 1924.

Keith, A.B.'s translation of the Taittirīya-Saṁhitā (Harvard Oriental Series).

Koran, The: E.H. Palmers translation (London 1928).

Kornitzer, Margaret: Child Adoption in the Modern World (London 1952).

Kulkarni, S.R.: Amarendra Man Singh v. Sanatan Singh 1934 36 Bom. L.R. (J) 25.

Kulkarni, S.R.: Bhimabai v. Gurunathgouda and After; [1933] 35 Bom. L.R. (J) 39.

Kulkarni, S.R.: The Doctrine of Relation Back in Adoption and its validity [1963] 65 Bom. L.R. (J). 4.

Kullūka: Manvarthamuktāvali, a commentary on the Manusmriti, ed. by Mandlik, Bombay, 1886.

Kumārila's Tantravārtika and Tuptika on Jaimini (Anandasrama Press.).

Lipstein, K.: Adoption in Private International Law: Reflections on the scope and the limits of a convention (1963) 12 I.C.L.Q. 835.

Macnaghten, F.: Considerations on the Hindu Law, (1824).

Macnaghten, Sir W.H.: Principles and Precedents of Hindu Law (2 vols.) 3rd edition, Madras, 1874.

Madhava: Parāśaramādhavīya, Vols. I-III, Bibliotheca Indica Series, Calcutta, 1889-1899.

Martindale: Law Directory (1963).

Max Muller (Edited by): Sacred Books of the East (Oxford University Press.)

Max Muller: Āpasthambha - The Sacred Laws of the Aryan - Part I, S.B.E. Vol. 12.

Max Muller: Baudhāyana - The Sacred Books of the Aryas, S.B.E. Vol. 14, p. 299.

Max Muller: Gautama - The Sacred Laws of the Aryas - Part I, S.B.E. Vol. 12.

Max Muller: Manu - The Laws of Manu, S.B.E. Vol. 25.

Max Muller: Nārada - Minot Law Books (Part I) S.B.E., Vol. 33.

Max Muller: Vasiṣṭha - The Sacred Laws of the Āryas, Part II, S.B.E. Vol. 14.

Max Mullar: Vishṇu - The Institution of Vishnu, S.B.E. Vol. 7.

Mayne, J.D.: Treatise on Hindu Law and Usage (9th, 10th and 11th editions).

McAleavy, H.: Certain aspects of Chiese customary law (1955) XVII, B.S.O.A.S., pp. 535 ff.

Medhātithi: A Commentary on the Manusmriti, Mandlik's ed., Bombay, 1886.

Meher, K. Master and Mr. Dhurandhar: The Adoption of Children Bill (being the draft of a bill for consideration by the Indian Federation of Women Lawyers, Bombay, 1967-68).

Meher K. Master: The Indian Adoption of Children Act in the making (Paper read at the Indian Federation of Women Lawyers Conference at Bangalore 1st to 2nd June 1968.)

Mitākṣarā, commentary on Yājñavalkyasmṛiti (Nirṇayasagara edn.).

Mitra Miśra: Viramitrodaya, a commentary on the Yājñavalkya-smṛiti, Benares, 1924.

Mulla, D.F.: Treatise on Hindu Law, 13th edn. Bombay, 1966.

Nandana: Nandani: A Commentary on the Manusmriti. Mandlik's edition, Bombay, 1886.

Narasimhachary, K.V.V.L.: Adoptive Mother 1953 2 M.L.J. (J) 23 to 27.

Narasimhachary, K. V.V.L.: After-effects of Adoption (1963) 2 An. W.R., J, 16.

Narasimham, G.V.: Adoption by a male Hindu; (1962) 2 S.C.J, J, 74 and (1962) 2 M.L.J. 56.

Narayan Das: Desirability of Amendments in present law of Hindu Adoption, A.I.R. 1965 Journal 27.

Nilakaṇṭha: Vyavahāramayūkha, ed. by P.V. Kane, Poona, 1926.

North, P.M.: Recognition of Foreign Divorce Decrees (1968) 31 M.L.R. 257.

Pannalal: Kumaun Local Customs.

Parāśara: Parāśarasmriti, Bibliotheca Indica Series, Vols. I to III, Calcutta, 1889-1899.

Pratapa Rudra: Sarasvatīvilāsa, Vyavahārakānda. Government Oriental Library Publications, Mysore, 1927.

Rabel: The Conflict of Laws, Ann Arbor, Chicago (1945).

Raghavachariar, N.R.: Hindu Law, Principles and Precedents, 5th edn, Madras, 1965.

Rāghavānanda: Manvarthachandrikā, a commentary on the Manusmṛiti, Mandlik's ed. Bombay, 1886.

Raghunandana: A commentary on the Dāyabhāga, Calcutta, 1863.

Raghunandana: Dāyatatva (Translated by G.C. Sarkar) Calcutta 1874.

Rattigan: Digest of Puhjab customary law (13th edn) ed. by O.P. Aggarwala, Allahabad and Delhi 1953.

Reddy, A. SHankar: A Stranger's right to sue on a contract;(1968) 26 An. W.R., J,13.

Rodolfe De Nova: Adoption in Comparative Private International Law: Recueil des Cours, 1961, pp. 75-153.

Sampath, B.N.: The Doctrine of relation back: An unfortunate revival [1970] 2 S.C.J. (J.) pp. 1-10.

Sarkar, R.N.: Adopted son if forfeits estate of natural father; A.I.R.1948 (J) 49.

Sarkar, R.N.: Hindu Law 8th edn.

Sarvadhikari's Tagore law lectures on Inheritance, Partition and Adoption (2nd edn., 1922).

Sarvajñanārāyana: Manvarthavivritti, a commentary on the Manusmṛiti, Mandlik's ed. Bonbay, 1886.

Sastri, Golapchandra Sarkar: A Treatise on Hindu law 4th, 5th edns. and 7th edn. 1936.

Sastri, G.C. Sarkar: The Hindu Law of Adoption, Calcutta (1st edn. 1891 and 2nd edn, 1916).

Sastri, Dr. Shama: Translation of Kautilya's Arthasastra.

Sastry, Sankara Ram: Fictions in the development of Hindu law texts, Madras 1926 with a foreword by Sir P.S. Sivaswamy Ayyar.

Sathe, Mrs. Tara, member of the Rajya Sabha introduced Private Members Bill No. III of 1967 for the Adoption of Children.

Saunders, Ian: Parental Consent to Adoption; The New Law Journal, July 15, 1971, pp. 608 to 610.

Sāyana's bhāsya on the Ṛigveda (edited by Vaidikasamsodhana Maṇḍala, Poona).

Scarman, The Hon. Mr. Justice: English Law and Foreign Adoptions (1962) 11 I.C.L.Q. 635.

Seervai: Constitutional Law of India (Bombay, Tripathi, 1967.)

Setlur, S.S.: A complete collection of Hindu Law books on Inheritance (1911).

Sherman's Roman Law, Vols. I and II.

Sircar, Shyamacharan: Vyavastha Chandrikā, 1880.

Sircar, Shyamacharan: Vyavastha Darpana, 2nd edn. 1867.

Siromani, J.S.: Commentary on the Hindu Law, (1885).

Sivaramayya, B.: Adoption: An Anomaly under the Indian Succession Act, (1960) S.C.J., J, 201.

Srikrisna: A commentary on the Dāyabhāga, Calcutta, 1863.

Srikrisna: Dāyakramasangraha, Ed. by Lakshmi Narayan Sarma, Calcutta 1828.

Steele, A.: The Law and customs of Hindoo castes, London, 1868.

Stokes, Whitley: Hindu Law Books, Madras, 1865.

Strange, Sir Thomas: Hindu Law, Vols. I and II (London 1830).

Sutherland, J.C.C.: Translation of Dattaka Mīmāṁsā and Dattaka Chandrikā, Madras 1879.

Tambiah, H.W.: The Law of Thesawalamai, Tamil Culture, 1958.

Vāchaspati Misra: Vivāda-Chintāmani, Calcutta, 1837.

Vaidyanathan, S.: Adoption by a daughter-in-law and divesting, A.I.R. 1967 Journal 135.

Vasiṣṭha: Vasiṣṭhasmriti (Anandasrama Press edition) Poona, 1905.

Venkataraman, S.: Adoption: Then and Now [1957] 2M.L.J., J, 65.

Venkataraman, S.: Elucidation of the rule in Amarendra's case [1955] 1 M.L.J. (J.) pp. 25 ff.

Venkataraman, S.: Theories of Maternal affiliation in adoption [1948] 2 M.L.J. (J) 17.

Venkataraman, S.: Theory of Relation Back in Adoption and Prior surrender (1949) 1 M.L.J; 31.

Vijnānesvara: Mitāksarā, a commentary on the Yājñavalkyasmriti Nirnayasagara ed., Bombay, 1909.

Viṣṇusmṛiti: Edited by Julius Jolly, Calcutta 1881.

Viśvarūpa: Madanapārijāta. Bibliotheca Indica Series, Calcutta, 1893.

West and Buhler: A Digest of Hindu Law, London 3rd edn. 1884 and 4th edn. 1919.

Wharton's Law Lexicon, 14th edn. London 1938.

Wilson, H.H.: A Glossary of Judicial and Revenue terms, Cal. 1940 ~~Calcutta, 1940.~~ Yājñavalkya: Yājñavalkyasmṛiti, Nirnayasagara edition. Bombay, 1909.

Statutes

Administration of Estates Act 1925 (The Public General Statutes 1925 Vol.I).

The Adoption Act 1950 (Halsbury's Statutes of England)

The Adoption Act 1958 (Halsbury's Statutes of England)

The Adoption Act 1964 (do. do.)

The Adoption Act 1968 (do. do.)

The Adoption Amendment Act 1956 of British Columbia (also Adoption Act 1957. The Revised Statutes of British Columbia 1960, Vol. I).

The Adoption of Children Act 1926 (Halsbury's Statutes of England).

The Adoption of Children (Regulation) Act 1939.

The Adoption of Children (Scotland) Act 1930 (Statutes - The Public General Acts, 1930).

Children Act 1958 (Halsbury's Statutes of England).

Children's Code of 1934 of Uruguay.

The Code of Criminal Procedure (A.I.R. Publication 3rd edn. Vol.III).

The Indian Contract Act IX of 1872.

Estate Duty Act 1953.

Foreign Marriage Act of 1969.

General Clauses Act (X of 1897).

Guardianship and Maintenance of Infants Act 1951.

Guardianship of Infants Act, 1886.

Guardianship of Infants Act, 1925.

Guardianship of Minors Act, 1971.

The Hindu Adoption and Maintenance Act 1956.

The Hindu Law of Inheritance (Amendment) Act II of 1929.

The Hindu Marriage Act 1955.

The Hindu Minority and Guardianship Act 1956.

The Hindu Succession Act 1956.

Income Tax Act 1952 (Halsbury's Statutes of England).

Indian Limitation Act 1908.

Laws of the State of Israel, Vol. 14, p. 93. The Adoption of Children Law 5720-1960.

Madras Village Offices Act (1895).

Married Women's Property Act 1882 (The Public General Statutes 1882).

Matrimonial Causes Act 1950 (Halsbury's Statutes of England).

Matrimonial Proceedings (Children Act) 1958 (Halsbury's Statutes of England).

(Mysore) Hindu Law: Women's Rights Act (X of 1933).

The Oudh Estates Act (I of 1869).

Punjab Tenancy Act of 1889.

The Special Marriage Act of 1954.

Succession (Scotland) Act 1964.

The Transfer of Property Act 1882.